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I. Introduction

The permutations of legal principles and facts are frustratingly incalculable. Nevertheless, predictability and stability of the law have always been desired goals, for they serve not only those who administer the law but also those who violate it. Thomas Sowell in his book, *Knowledge and Decisions*, posited an interesting view of criminal law as

> basically a process for transmitting and evaluating knowledge about the guilt or innocence of individuals suspected of crime. It is also a process for transmitting to actual and potential criminals effective knowledge of the costs of their crimes to others . . .[1]

Understandably then, a process based on the transmission of knowledge with important social consequences must place a premium on accuracy, consistency and predictability; otherwise, like the mythological Penelope, we shall be left with the enervating dilemma of forever undoing that which we did yesterday.[2] Justice Holmes, in his eloquently parodoxical phraseology, valued predictability in the law. In his 1897 address at the Boston University School of Law, he spoke of law as nothing more than a body of "systematized prediction" or "prophecies of the past."[3] For him, the law could be under-

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1. T. SOWELL, KNOWLEDGE AND DECISIONS 269 (1980).

2. Eugen Ehrlich, a noted legal historian and scholar, spoke in terms of the "stability of legal norms." *See* E. EHRLICH, FUNDAMENTAL PRINCIPLES OF THE SOCIOLOGY OF LAW 132 (1936) (reprinted in 1962).

3. Holmes, *The Path of the Law*, 10 HARV. L. REV. 457 (1897), *reprinted in* M. LERNER, THE MIND AND FAITH OF JUSTICE HOLMES 71, 72-73 (1943) [hereinafter referred to as LERNER].

stood only from the point of view of "the bad man"[4] who cares not about axioms or deductions, but who wants to know what a court is likely to do if he breaks the law. Thus, Holmes said, "[t]he prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law."[5]

A. The Pennsylvania Experience: Predictability or Confusion?

For those court-watchers in Pennsylvania who place a premium upon the goals of predictability and stability, the recent spate of Pennsylvania Supreme Court opinions in the criminal area may have engendered confusion or concern. Of approximately twenty-three opinions rendered by the supreme court in a four-month period,[6] the reversal rate was approximately sixty-five percent.[7] Despite the inherent limitations of such informal and random statistics,[8] a "high" reversal rate sparks a momentary pause for concern. It is too easy to

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4. LERNER, *supra* note 3, at 74; *but cf.* EHRLICH, *supra* note 2, at 440.

5. LERNER, *supra* note 3, at 75.

6. The opinions were filed in the last quarter of 1983. The lower court, in most of these cases, was the Pennsylvania Superior Court, hereinafter referred to as superior court.

7. The reversal cases include Commonwealth v. Brown, 503 Pa. 514, 469 A.2d 1371 (1983); Commonwealth v. DiNicola, 503 Pa. 90, 468 A.2d 1078 (1983); Commonwealth v. Dunbar, 503 Pa. 590, 470 A.2d 74 (1983); Commonwealth v. Ziegler, 503 Pa. 555, 470 A.2d 56 (1983); Commonwealth v. Macolino, 503 Pa. 201, 469 A.2d 132 (1983); Commonwealth v. McCann, 503 Pa. 190, 469 A.2d 126 (1983); Commonwealth v. McGrath, ___ Pa. ___, 470 A.2d 487 (1983); Commonwealth v. Majorana, 503 Pa. 602, 470 A.2d 80 (1983); Commonwealth v. Manley, 503 Pa. 482, 469 A.2d 1042 (1983); Commonwealth v. Parker, 503 Pa. 336, 469 A.2d 582 (1983); Commonwealth v. Reiss, 503 Pa. 45, 468 A.2d 451 (1983); Commonwealth v. Sell, ___ Pa. ___, 470 A.2d 457 (1983); Commonwealth v. Shoemaker, 502 Pa. 573, 467 A.2d 819 (1983); Commonwealth v. Ohle, 503 Pa. 566, 470 A.2d 61 (1983); Commonwealth v. Cooper, 503 Pa. 29, 467 A.2d 1301 (1983); Commonwealth v. Pollino, 503 Pa. 23, 467 A.2d 1298 (1983) Commonwealth v. Askin, 502 Pa. 575, 467 A.2d 820 (1983).

Affirmance cases include Commonwealth v. Cabeza, 503 Pa. 228, 469 A.2d 146 (1983); Commonwealth v. Carson, 503 Pa. 369, 469 A.2d 599 (1983); Commonwealth v. Green, 503 Pa. 278, 469 A.2d 552 (1983); Commonwealth v. Fava, 503 Pa. 365, 469 A.2d 597 (1983); Commonwealth v. Hamlin, 503 Pa. 210, 469 A.2d 137 (1983); Commonwealth v. Magwood, 503 Pa. 169, 469 A.2d 115 (1983); Commonwealth v. Romeri, ___ Pa. ___, 470 A.2d 498 (1983); Commonwealth v. Scott, 503 Pa. 624, 470 A.2d 91 (1983).

Initially, however, we must place these statistics in a proper perspective. Many cases, for example, approach the supreme court level on petition for further review and are denied summarily without comment.

Appeals from the superior court to the supreme court, for example, undergo a process known as a "petition for allowance of appeal," popularly referred to as "allocatur." *See* PA. R. APP. P. 1111-1123. PA. R. APP. P. 1114 specifies that allowance of appeal is a matter of sound judicial discretion and will be allowed only when there are "special and important reasons." Such denials, therefore, silently represent constructive approval of the decision-making product of the lower courts. Correlatively, those cases selected for further review — including those eventually reversed — represent a potentially "stacked deck." There is no adequate control group to gauge the accuracy or productivity of the lower tiers of decision-making.

Only a small percentage of appeals from the superior court receives further review in the supreme court. Between 1976-1980 there were from 3,631 to 4,523 appeals filed each year in the superior court. In that same time period, allocatur petitions granted by the supreme court ranged from 118 to 215 each year. Administrative Office of Pennsylvania Courts, *Statistical Report*, Tables 7-8 (1976-1980).

8. For a discussion of the limited use of statistics, see Wier on behalf of Weir v. Heckler, 734 F.2d 955, 957 nn.2,3 (3d Cir. 1984).

fall prey to the glib conclusion that reversal-affirmance necessarily represents right or wrong. As Justice Homes once observed,

> I once heard a very eminent judge say that he never let a decision go until he was absolutely sure that it was right. So judicial dissent often is blamed, as if it meant simply that one side or the other were not doing their sums right, and, if they would take more trouble, agreement inevitably would come.[9]

Yet in the adversarial process of American justice, complete agreement is no more attainable among judges, lawyers and scholars than it is among adversaries.[10] In some cases, disagreement outside the adversary forum can be even more bitter. A very good and public illustration of caustic debate occurred in 1959-1960 in two issues of the *Harvard Law Review*. A distinguished scholar, Professor Henry M. Hart, Jr., severely criticized the United States Supreme Court for the "absence of reason" in its opinions and the consequential danger of the Court's undermining the professional respect of "first-rate lawyers" for the Court. Of the forty pages devoted to Professor Hart's analysis, the following is a typical example:

> They lack the underpinning of principle which is necessary to illumine large areas of the law and thus to discharge the function which has to be discharged by the highest judicial tribunal of a nation dedicated to exemplifying the rule of law not only to itself but to the whole world. Only opinions which are grounded in reason and not on mere fiat or precedent can do the job which the Supreme Court of the United States has to do. Only opinions of this kind can be worked with by other men who have to take a judgment rendered on one set of facts and decide how it should be applied to a cognate but still different set of facts. Only opinions of this kind can carry the weight which has to be carried by the opinions of a tribunal which, after all, does not in the end have the power either in theory or in practice to ram its own personal preferences down other people's throats.[11]

Such professional criticism, even when directed toward others, is oftentimes not taken lightly. In like manner, but with a strong undercurrent of sarcasm, Thurman Arnold was afforded approximately twenty pages in a subsequent review to criticize Professor Hart's

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9. LERNER, *supra* note 3, at 79-80.

10. *See* EHRLICH, *supra* note 2, at 241-42, in which Ehrlich states:

> Among all of the ideas of justice that have been described until now there is not one that has failed to encounter an antagonist in the course of historical development who, in the deepest chest-tones of genuine conviction, would proclaim the opposite as that which alone is just. This affords a deep insight into the nature of justice.

Id.

11. Hart, *Foreward: The Time Chart of the Justices*, 73 HARV. L. REV. 84, 99 (1959).

"tenents of procedural theology" and his characterization of opinions as "judicial monstrosities."[12]

Although the limitations of statistics and inevitability of criticism may shed some light on the perilous pitfalls of decision-making, the quest for principled decision-making, including predictability and stability, must inevitably lead to further careful reflection and historical analysis. Are the reversals, from an intermediate appellate court's perspective, for example, attributable to factors such as changing conditions, the lessons of experiences, the perceived errors of past decisions, or merely the vicissitudes of the judicial process?[13] Eugen Erhlich once observed that it is the "function of juristic science, in the first place, to record the trends of justice that are found in society, and to ascertain what they are, whence they come, and whither they lead . . ."[14]

Justice Holmes, in a similar vein, noted that the primary significance in every new effort of legal thought was to make the so-called prophecies more precise and to generalize them into a thoroughly connected system.[15] An economist's approach toward the problem of principled appellate decision-making was expressed in the following manner:

> If appellate courts are to be part of a coherent legal system, rather than arbiters armed with power to decide each case anew in whatever way they choose, then what is decided in one case must be part of a legal pattern applicable to other cases with similar objective factors involved. What is decided in extreme cases becomes a precedent for other cases. In this kind of social package deal, often "hard cases make bad law" for the future. . . . Appellate courts can adjust the application of their decisions to some extent, but there are limits to how far this can go and still retain the rule of law and the role of appellate courts as rule-making organizations, rather than roving commissions with sovereign powers to decide each case as they please. This is neither a criticism nor a defense of appellate courts, but simply an indication of the momentous legal trade-offs involved.[16]

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12. Arnold, *Professor Hart's Theology*, 73 HARV. L. REV. 1298, 1304-05 (1960).

13. These factors are identified and described in Israel, "*Gideon v. Wainwright: The 'Art' of Overruling*," 1963 SUP. CT. REV. 211, 215, 219-29 (Univ. of Chicago 1963).

14. EHRLICH, *supra* note 2, at 202.

15. LERNER, *supra* note 3, at 72.

16. SOWELL, *supra* note 1, at 273. Ehrlich noted that legal scientists could learn and benefit from economists in that they both deal with different aspects of the same social phenomena. *See* EHRLICH, *supra* note 2, at 503-04. Justice Holmes also once stated that the man of the future is not the black letter man but the man of statistics and master of economics. LERNER, *supra* note 3, at 83.

B. The Pennsylvania Experience: The Futile Attempt to Reconcile?

The line-drawing involved in the so-called "adjustment" in the application of decisions versus "unprincipled" decision-making can be treacherous. Principled decision-making, like predictability and stability, are desirable goals not always achieved as fully as one would like. To extract a principle of universality from a given case is dangerous since the logic of the law is often superficial and often rests primarily in its language rather than its substance.[17] The difficulty in extracting universal precepts or reconciling similar cases with different results can be illustrated by just two recent supreme court cases, *Commonwealth v. Ziegler*[18] and *Commonwealth v. McGrath*.[19]

Both cases were decided during the same term and addressed the issues of suppression of inculpatory statements because of a failure to give the required *Miranda*[20] warnings. *Ziegler* involved an intensive post-shooting "debriefing" in which the defendant, a police officer, was taken "through the ranks," in an effort to determine how the fatal shooting occurred. The questioning of the officer, pursuant to mandatory police department directives, lasted for approximately five hours, during which time the officer himself was not permitted to make any calls. During the course of the questioning, defendant Ziegler gave incriminatory statements. No *Miranda* warnings were given. The lower court's order of suppression, affirmed by the superior court,[21] was reversed.

McGrath concerned the admissibility of statements taken from a Marine private. The interview of the marine was in apparent response to a charge of fraudulent enlistment, although, at the time of the interview, Marine officers knew that there was an outstanding warrant against McGrath for a pre-enlistment homicide. The private was under constant supervision and taken through the rising command of his interrogators. No *Miranda* warnings or those required by military regulations were given. Following his conviction of third

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17. *See* LERNER, *supra* note 3, at 80. Consider, for example, the legal rules pertaining to presumptions. Professor McCormick noted that the existence of a presumed fact flowing from the establishment of a basic fact would not be possible if rules of logic were applied. The advisory committee's note to Fed. R. Evid. 301 reinforces the sometimes cosmetic logic of the law. *See* MCCORMICK, EVIDENCE 807 (2d ed. 1972); and see Professor Edmund Morgan's prefatory comments on presumptions in AMERICAN LAW INSTITUTE, MODEL CODE OF EVIDENCE 1, 52-53 (1942). Consider also the rationality of the fertile octogenarian rule in the law of property. Professor Mellinkoff speaks of how the "immovable presumption of lifelong fecundity" met the "irresistible Rule Against Perpetuities." D. MELLINKOFF, THE LANGUAGE OF THE LAW 443 (1963).

18. 503 Pa. 555, 470 A.2d 56 (1983).

19. ___ Pa. ___, 470 A.2d 481 (1983).

20. Miranda v. Arizona, 384 U.S. 436 (1966).

21. 304 Pa. Super. 623, 450 A.2d 1055 (1982).

degree murder, the supreme court, on direct appeal, issued a plurality opinion[22] and reversed because McGrath's statements had been improperly admitted at his trial.

The factual scenarios are simplistically described for the moment because the interesting aspect of the two cases is their differences in approach and tone toward a similar legal issue. In regard to the setting or context, the interview in Officer Ziegler's case is described nonperjoratively as a "debriefing," viewed as a mere routine, administrative matter between the employer and his employee; in Private McGrath's case, the plurality stresses, with perjorative emphasis, the "rising chain of command," the "interview" and "the realities of the military situation."[23] Likewise, the different values placed on *Miranda* are significant. In Officer Ziegler's case, the court interprets *Miranda* narrowly as protecting the accused from *incommunicado* interrogation and coercive police tactics.[24] Such a view, incidentally, probably comports with the recent views of the United States Supreme Court.[25] On the other hand, the court in Private McGrath's case disavows a myopic focus[26] of *Miranda* and stresses not only the significance of a deprivation of physical freedom but, unlike *Ziegler*, also emphasizes the suspect's reasonable belief about what is happening to him. *McGrath* takes a "totality of circumstances" and, essentially, a "common sense" approach to support its order of inadmissibility notwithstanding Justice McDermott's observation that the result was "directly contradictory" with that reached in *Ziegler*.

In both cases, the principle in issue was simple: one who is subject to "custodial interrogation" is entitled to receive beforehand his constitutional *Miranda* warnings as a predicate to the later admissibility of any statements. Yet in both cases, the analyses and results vary.

C. The Dialectics and Methodology of History — The Myth and the Pendulum?

The *Ziegler* and *McGrath* cases illustrate the difficulty in pursuing predictability and universality in the law.[27] The dismaying ex-

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22. Two justices dissented and two justices concurred in the result. The dispute generated by the plurality opinion concerns the application of *Miranda*, under a totality of circumstances approach, where the questioner's status is not strictly one of law enforcement.

23. *McGrath*, ___ Pa. at ___, 470 A.2d at 493.

24. *See Ziegler*, 503 Pa. at 561, 470 A.2d at 58-59.

25. Custodical arrest was interpreted very narrowly in Minnesota v. Murphy, 104 S. Ct. 1136 (1984).

26. *McGrath*, ___ Pa. at ___, 470 A.2d at 492.

27. *See* S. HAMPSHIRE, MORALITY AND CONFLICT (Harv. Univ. Press 1983), wherein the author questions the role of logic and universality in the identification and application of standards of conduct.

perience, to some at least, is the inevitable futility that one encounters in maintaining the belief that all law can be reasoned from a color-matching analysis of our "prophecies of the past." Nevertheless, the development of the law does contain some lessons for the present. "The rational study of law is still to a large extent the study of history."[28] Sometimes trends and patterns may be evident that, in hindsight, either contribute to the stability of the content of the law or pour new content in order to give law a new meaning. The following discussion addresses a very small span of criminal jurisprudence in Pennsylvania. The purpose is to appreciate that past law and perhaps understand the present.

II. *Per se* Rules: Automatic Justice

In the years between 1972 and 1977, revolutionary changes occurred in the criminal justice system in Pennsylvania. These changes, moreover, were all potentially beneficial to defendants. Six important areas were affected: speedy trial, jury trial waivers, guilty plea colloquies, custodial interrogation of juveniles, prompt arraignment of the accused, and insanity defenses. In each area, rigid *per se* prophylactic rules[29] were created or, as will be seen, such rules incre-

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28. LERNER, *supra* note 3, at 83.

29. Oftentimes one will find the terms "prophylactic" and "*per se*" indiscriminately used without any specific definitional import. *See, e.g.*, Commonwealth v. Williams, 504 Pa. 511, 475 A.2d 1283 (1984). Many of the cases cited herein use such terms without distinction. Other courts have used the terms in various contexts. *See, e.g.*, Bradford v. Gardner, 578 F. Supp. 382 (E.D. Tenn. 1984) (whether crowded sleeping quarters in jail are per se unconstitutional); Abdul-Karim v. First Fed. S & L Ass'n, 101 Ill.2d 400, 462 N.E.2d 488 (1984) (due-on-sale provision in mortgage is valid *per se*); Davidoff by Davidoff v. Metro Baseball Club, Inc., 61 N.Y.2d 996, 1000-01, 475 N.Y.S. 2d 367, 368 (1984) (Cooke, C.J., dissenting) (*per se* rule governing duty of care owed by proprietor of baseball field considered).

The term "*per se*" has been defined as meaning "by itself" and referring to "in its own nature without reference to its relations." *See* BLACK'S LAW DICTIONARY 1028 (5th ed. 1979). The term "prophylactic" has been described as tending to prevent or ward off, preventive, cautionary. *See* WEBSTER'S 3RD NEW INTERNATIONAL DICTIONARY 1818 (1976).

In the context of this paper, the terms, although used interchangeably, have potentially distinct meanings and functions. *Per se*, for example, may be considered in two different respects. *Per se* may refer to the rigid application of a rule irrespective of attending circumstances. Consider the rules requiring an intelligent and informed adult's consultation with a charged minor or the specification of particular areas of inquiry before accepting a defendant's guilty plea or jury trial waiver. Collateral facts or circumstances are not considered in deciding whether the rule must be implemented. On the other hand, *per se* is a term that can also refer to the remedy itself when the inflexible rule is violated. In Rule 1100 cases, the *per se* remedy, irrespective of costs or other considerations, is discharge; in most other cases, the remedy is a new trial or suppression of evidence. The *per se* rule represents, in a sense, an "If A, then B" type of logic with respect to both application and remedy.

"Prophylactic," likewise, is a term that can turn inward upon itself or outward toward the situation and its consequences. First, the term may relate to the purpose of the promulgated rule. Most *per se* rules have been designed to avoid unnecessary and inexcusable violations of a defendant's rights; and such rules have been justified for their facilitating administrative convenience and uniformity in the application of law. In Rule 1100 cases, for example, the objects of prevention are excessive backlogs, violation of a defendant's speedy trial right, administrative difficulties and inequitable application of the potentially expansive "speedy trial" term. On the other hand, the term can look beyond the requirements of the rule and toward the remedy.

mentally insinuated themselves into the criminal justice system. The prevailing sentiments in these cases were essentially the (1) protection of the rights of the accused, (2) administrative convenience and uniformity in the application of the law, and (3) prevention of future abuse through the imposition of costly remedies such as discharge, exclusion of evidence, or grant of a new trial.

A. Rule 1100

In 1972, in a unanimous decision authored by Justice (now Chief Justice) Nix, the groundwork for the controversial Rule 1100[30]

If the remedy is harsh enough, law enforcement and courts may respond to the letter of the rule with more intelligence, understanding and perhaps sensitivity. Thus, the prophylactic content of a *per se* rule, in a remedial sense, may represent an inherent costly incentive to motivate others to avoid, for example, the suppression of evidence, the grant of a new trial or the discharge of a defendant. Purpose and remedy are thus important to a rule with a prophylactic thrust.

Such malleable terms, of course, are not limited to use by lawyers and courts. F. Scott Fitzgerald apparently once wrote a song ("Love or Eugenics") in 1914 for the Princeton Triangle Show. The song stated in part: "Men, which would you like to come and pour your tea,/ Kisses that set your heart aflame,/Or love from a prophylactic dame." *See* D. Kevles, *Annals of Eugenics - A Secular Faith*, THE NEW YORKER 52 (October 15, 1984).

30. PA. R. CRIM. P. 1100 [hereinafter referred to as Rule 1100]. The Rule is not applicable to cases initiated prior to June 30, 1973. *See* Commonwealth v. Tolassi, 489 Pa. 41, 413 A.2d 1003 (1980). The Rule applied a 270 day period to complaints filed between June 30, 1973 and July 1, 1974.

Pennsylvania's present speedy trial rule states:

> Rule 1100. Prompt Trial
>
> (a)(1) Trial in a court case in which a written complaint is filed against the defendant after June 30, 1973 but before July 1, 1974 shall commence no later than two hundred seventy (270) days from the date on which the complaint is filed.
>
> (2) Trial in a court case in which a written complaint is filed against the defendant after June 30, 1974 shall commence no later than one hundred eighty (180) days from the date on which the complaint is filed.
>
> (3) Trial in a court case which is transferred from the juvenile court to the trial or criminal division shall commence no later than one hundred eighty (180) days from the date of filing the transfer order.
>
> (b) For the purpose of this Rule, trial shall be deemed to commence on the date the trial judge calls the case to trial, or the defendant tenders a plea of guilty or *nolo contendere*.
>
> (c)(1) At any time prior to the expiration of the period for commencement of trial, the attorney for the Commonwealth may apply to the court for an order extending the time for commencement of trial.
>
> (2) A copy of such motion shall be served upon the defendant through his attorney, if any, and the defendant shall also have the right to be heard thereon.
>
> (3) Such motion shall set forth facts in support thereof, and shall be granted only upon findings based upon a record showing that trial cannot be commenced within the prescribed period despite due diligence by the Commonwealth and, if the delay is due to the court's inability to try the defendant within the prescribed period, upon findings based upon a record showing the causes of the delay and the reasons why the delay cannot be avoided.
>
> (4) Any order granting a motion for extension shall specify the date or period within which trial shall be commenced. Trial shall be scheduled for the earliest date or period consistent with the extension request and the court's business, and the record shall so indicate.
>
> (d) In determining the period for commencement of trial, there shall be excluded therefrom:

was established. *Commonwealth v. Hamilton*[31] was an appeal by the Commonwealth involving an admittedly egregious delay of six years in the defendant's trial. The defendant claimed that, as a result, he was severely prejudiced in his ability to secure testimony. At the time, speedy trial rules existed in some form in approximately thirty-three states.[32] Of these states, twenty imposed the bar of subsequent prosecution for violation of such rules. The court in *Hamilton* perceived the need to establish a mandatory 180-day-trial-or-discharge rule in order to rectify the severe case backlog problems in Pennsylvania. At the same time, the court felt that such a rule would protect the liberty and constitutional speedy trial interests[33] of defendants. Justice Nix identified those preponderating interests as follows: vagueness and subjectivity inherent in a general speedy trial concept would be eliminated; a case-by-case analysis, administratively costly, would be avoided; and courts would be "stimulated" by the new rule to reduce their backlogs.[34] For Hamilton, a man charged with murder, a proposed rule of procedure and enunciation of policy resulted in his discharge.

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(1) the period of time between the filing of the written complaint and the defendant's arrest; provided that the defendant could not be apprehended because his whereabouts were unknown and could not be determined by due diligence;

(2) any period of time for which the defendant expressly waives Rule 1100;

(3) such period of delay at any stage of the proceedings as results from:

(i) the unavailability of the defendant or his attorney;

(ii) any continuance granted at the request of the defendant or his attorney.

(e)(1) When a trial court has granted a new trial and no appeal has been perfected, the new trial shall commence within one hundred and twenty (120) days after the date of the order granting a new trial.

(2) When an appellate court has granted a new trial, or has affirmed an order of a trial court granting a new trial, the new trial shall commence within one hundred and twenty (120) days after the appellate court remands the record to the trial court. The date of remand shall be the date as it appears in the appellate court docket.

(f) At any time before trial, the defendant or his attorney may apply to the court for an order dismissing the charges with prejudice on the ground that this Rule has been violated. A copy of such motion shall be served upon the attorney for the Commonwealth, who shall also have the right to be heard thereon. Any order granting such motion shall dismiss the charges with prejudice and discharge the defendant.

(g) Nothing in this rule shall be construed to modify any time limit contained in any statute of limitations.

31. 449 Pa. 297, 297 A.2d 127 (1972).

32. *Id.* at 308, n.10, 297 A.2d at 132, n.10. *See also* Joseph, *Speedy Trial Rights in Application*, 48 FORDHAM L. REV. 611 (1980); Note, *The Right to a Speedy Criminal Trial*, 57 COLUM. L. REV. 846 (1957).

33. *See infra* note 77. The federal right is not limited by specific temporal considerations. Factors relevant to a speedy trial violation assessment under federal law include the length of the delay, the reason for the delay, the prejudice to the defendant and the defendant's assertion of his rights. *See* Barker v. Wingo, 407 U.S. 514 (1972).

34. 449 Pa. at 306-09, 297 A.2d at 132-33. *But see infra* note 77.

B. *Jury Trial Waiver*

In 1973, the court was given the opportunity to address a fundamental concept — the right of a defendant to a jury trial.[35] The right itself, of course, was not in question; rather, the issue was the extent of a defendant's understanding of that right before a valid waiver could be effectuated. Through Justice Nix, with one concurrence and one dissent, the court ordered a new trial in *Commonwealth v. Williams*[36] because there was no on-the-record explanation to the defendant of the right that he relinquished in a signed, written waiver. The *Williams* court reasoned: "Nowhere on the record is there any indication that he knew the *essential ingredients* of a jury trial which are necessary to understand the significance of the right he was waiving."[37] In its references to *Commonwealth v. Fugmann*,[38] the court obviously believed that it was implementing an essential right guaranteed by the Pennsylvania Constitution.[39] Although interestingly the jury trial waiver issue was asserted in an ineffectiveness context, the noteworthy aspect of *Williams* is its explicit renunciation of the need for any prophylactic rule for noncompliance with the then existing Pennsylvania Rule of Criminal Procedure 1101. Facially then, *Williams* was not a *per se* case.

Nevertheless, five years later, some *post hoc* rationalization both revealed and supported the inflexibility of *Williams*. In *Commonwealth v. Morin*,[40] another ineffectiveness case with two dissents,[41] Justice Manderino rejected the Commonwealth's argument that a remedy for a defective colloquy, that is, on-the-record omission of one of more of the "essential ingredients," was a remand for an evidentiary hearing rather than a new trial. Asserting the need to protect a defendant's constitutional rights and promote more effective appellate review of jury trial waiver issues, the majority ordered a new trial.

Shortly thereafter, in Justice Pomeroy's dissent in *Commonwealth v. Greene*,[42] the nonprophylactic basis for *Williams* was argued. Justice Pomeroy, speaking for himself and two other justices, recognized, however, that perhaps *Morin* transformed *Williams* into

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35. The right to a jury trial in criminal cases is guaranteed in the federal and state constitutions. *See* U.S. CONST. amend. VI; PA. CONST., art. 1, §§ 6, 9.

36. 454 Pa. 368, 312 A.2d 597 (1973).

37. *Id.* at 373, 312 A.2d at 600 (emphasis added). The essential ingredients of a jury trial were deemed to include a jury of one's peers, unanimity of verdict and defendant's participation in the selection of the jury.

38. 330 Pa. 4, 198 A. 99 (1938).

39. *See supra* note 35.

40. 477 Pa. 80, 383 A.2d 832 (1978).

41. Six justices participated in the decision of the case.

42. 483 Pa. 195, 394 A.2d 978 (1978).

an inflexible rule.[43] The six-man majority in *Greene* issued a *per curiam* opinion in support of its new trial order because the defendant was not properly advised of the unanimity aspect of his right to a jury trial. Thus, the inflexibility of the jury trial waiver rule had its genesis in *Williams* and its full development in *Morin* and *Greene*.

C. *Guilty Plea Colloquy*

The rigid rules initially established for jury trial waivers serve as an interesting parallel to the guilty plea colloquy rule. In 1974, the supreme court enunciated the so-called *Ingram* standard.[44] One can read *Ingram* repeatedly and still question whether *Ingram's* intent was presumably, like that of *Williams*, to establish a set of inflexible requirements. Was *Ingram's* purpose, recognizably stated in the context of a simplistic colloquy, to require the lower courts to assure that defendants understood the charges to which they were pleading guilty; or did the "minimum areas of inquiry," suggested in the comments to Rule 319 of the Pennsylvania Rules of Criminal Procedure,[45] establish a prophylactic basis for the rule?

A crucial passage of *Ingram* stated that the defendant "was entitled to an explanation of the *elements* of the crime of murder *with* an illustrative elucidation of the term 'malice.' "[46] In another portion

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43. *Morin* and *Greene*, not *Williams*, established the *per se* character of the jury trial waiver rule.

44. Commonwealth v. Ingram, 455 Pa. 198, 316 A.2d 77 (1974). Justice Pomeroy concurred in the result. There were no dissents.

45. At the time *Ingram* was decided, PA. R. CRIM. P. 319(a) provided:

> (a) Generally. A defendant may plead not guilty, guilty, or, with the consent of the court, nolo contendere. The judge may refuse to accept a plea of guilty and shall not accept it unless he determines after inquiry of the defendant that the plea is voluntarily and understandably tendered. Such inquiry shall appear on the record.

The court in *Ingram* stated:

> The comments recommend that at a *minimum* the judge asks questions to elicit the following information:
>
> (1) Does the defendant understand the nature of the charges to which he is pleading guilty?
>
> (2) Is there a factual basis for the plea?
>
> (3) Does the defendant understand that he has the right to trial by jury?
>
> (4) Does the defendant understand that he is presumed innocent until he is found guilty?
>
> (5) Is the defendant aware of the permissible range of sentences and/or fines for the offenses charged?
>
> (6) Is the defendant aware that the judge is not bound by the terms of any plea agreement tendered unless the judge accepts such agreement?

455 Pa. at 204-05 n.5, 316 A.2d at 81 n.5 (emphasis added). The court in *Ingram* was concerned primarily with items (1) and (2). The court found a sufficient factual basis from the defendant's admission that he shot and killed the victim. There was, however, no satisfaction of item (2) since the lower court's comments to the defendant about shooting and killing were not tantamount to warning the defendant of the legal explanation of murder. The distinctive character and importance of the elements component, moreover, was emphasized in note 4 of *Ingram*.

46. 455 Pa. at 204, 316 A.2d at 80 (emphasis added).

of the opinion, however, the court simply said that the elements of the crime must be outlined in understandable terms.[47] Such a statement is not equivalent to establishing an element-of-the-crime requirement. Yet it would seem that *Ingram* required both a recitation and an explanation of the elements. A mandatory, prophylactic viewpoint is buttressed by the court's explanation that its new pronouncement and implementation of the rule would facilitate appellate review; in addition, of course, it would protect the defendant. Nevertheless, it was in *Commonwealth v. Minor*[48] that the supreme court, citing with approval a *Harvard Law Review*[49] article, stated that a defendant's understanding must be based on an on-the-record explanation to him of the nature and elements of the crime charged.

The implementation and enforcement of the new rule necessitated new trials in both *Ingram* and *Minor*.[50] The costs of the *Ingram* rule were not assessed. The overriding values were protection of the defendant's rights[51] and the simplification of the appellate review process.

D. Interested-Adult Rule

There have been other occasions when our courts have preferred to slide, rather than jump, into prophylactic rule-making. The interested-adult rule,[52] often referred to as the "*McCutchen* rule," is an example.

Commonwealth v. McCutchen[53] has been viewed as having established a *per se* rule that no person under the age of eighteen years

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47. *Id.* at 204, 316 A.2d at 80.

48. 467 Pa. 230, 356 A.2d 346 (1976), *overruled*, Commonwealth v. Minarik, 493 Pa. 573, 487 A.2d 623 (1981). Two justices dissented in *Minor*. Justice Pomeroy stated that *Ingram* was not required by federal or state law.

49. *See The Supreme Court, 1968 Term*, 83 HARV. L. REV. 7, 184 (1969).

50. *Minor* made clear that the remedy for a defective colloquy was a reversal of the "tainted conviction." *Minor*, 467 Pa. at 235 n.4, 356 A.2d at 348 n.4.

51. The Supreme Court in 1969 noted that a guilty plea involved a waiver of important constitutional rights such as the privilege against self-incrimination, the right to trial by jury and the right to confront one's accusers. Boykin v. Alabama, 395 U.S. 238, 243 (1969) (no on-the-record supporting colloquy). *See also infra* note 107.

52. The term is only partially accurate. The rule is actually the interested *and* informed adult rule. The cornerstone of the rule is believed to be the inexperience of youth. *See, e.g.*, Commonwealth v. Smith, which states:

> The new rule appreciates that the inexperience of the minor affects not only his or her ability to understand the full implication and consequences of the predicament but also renders the judgment inadequate to assess the spectrum of considerations encompassed in the waiver decision. It was therefore reasoned that the impediment of immaturity can only be overcome where the record establishes that the youth had access to the advice of an attorney, parent, or other interested adult and that the consulted adult was informed as to the constitutional rights available to the minor and aware of the consequences that might follow the election to be made.

472 Pa. 492, 498-99, 372 A.2d 797, 800 (1977) (footnotes and citations omitted).

53. 463 Pa. 90, 343 A.2d 669 (1975), *cert. denied*, 424 U.S. 934 (1976).

could effectively waive his constitutional rights to remain silent and to have the assistance of counsel, without first being accorded an opportunity to consult with an informed adult who is interested in that juvenile's rights. *McCutchen*, as well as the two prior cases upon which it relied, *Commonwealth v. Roane*[54] and *Commonwealth v. Starkes*,[55] were plurality opinions. Although they did not have precedential significance,[56] they were influential in laying the groundwork and in articulating the motivating concerns for a new *per se* rule.[57] Again, the concerns centered on the rights of the defendant — the right to counsel and the privilege against self-incrimination.[58] And again, the price of noncompliance was significant and unassessed, namely, a new trial and the exclusion of evidence without regard to the factual context (for example, age, intelligence, prior criminal experience of defendant, nature and extent of prior consultations) of the case.

The *McCutchen* rule established a foothold in our jurisprudence in *Commonwealth v. Riggs*,[59] a *per curiam* opinion with two dissents. Justice Nix's concurrence is especially noteworthy. Justice Nix, with prescience that may not have been appreciated at the time, stated simply that the governing analysis had been confused. In his view, the proper test was a *totality*-of-the-circumstances test which, he said, had in fact been applied in *McCutchen*. Notwithstanding this observation, the interested-adult rule became known as the *McCutchen* rule and was thereafter applied inflexibly.

E. Prearraignment Delay

In 1977, the Pennsylvania Supreme Court boldly articulated a *per se* rule of exclusion for cases of prearraignment delay. The seminal case was *Commonwealth v. Davenport*,[60] in which a unanimous court, through Justice (later Chief Justice) Roberts, formulated the following sweeping rule: If an accused is not arraigned within six hours of arrest, any statement obtained after arrest, but before arraignment, shall not be admissible at trial.[61]

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54. 459 Pa. 389, 329 A.2d 286 (1974).

55. 461 Pa. 178, 335 A.2d 698 (1975). The prior rule, it should be noted, was governed by a totality-of-circumstances test. *See* Commonwealth v. Moses, 446 Pa. 350, 287 A.2d 131 (1971).

56. Plurality opinions do not have automatic precedential authority. *See* Commonwealth v. Davenport, 462 Pa. 543, 342 A.2d 67 (1975); Commonwealth v. Covil, 474 Pa. 375, 378 A.2d 841 (1977).

57. The dissent in *Roane*, in fact, considered the prophylactic rule as having established a foothold.

58. *See Roane*, 459 Pa. at 393-94, 329 A.2d at 288; *Starkes*, 461 Pa. at 182 n.3, 335 A.2d at 700 n.3.

59. 465 Pa. 208, 348 A.2d 429 (1975).

60. 471 Pa. 278, 370 A.2d 301 (1977). C.J. Jones did not participate.

61. The precursor to *Davenport* was Commonwealth v. Futch, 447 Pa. 389, 290 A.2d

The underlying rationales of this rule were to protect the accused's right to know the nature and cause of the accusations against him and to protect him from unreasonable seizures.[62] The functional justifications were familiar: simplifying the task of determining admissibility by furthering judicial economy and eliminating the need for pretrial litigation; promoting more even-handed application of criminal procedural rules; giving guidance to the trial courts, bar and police; and deterring violations of rules designed to protect the rights of the accused. The rule appeared broad, clear and admitting of no exceptions. Except one. At note seven of the opinion, however, the court, through Justice Nix, noted that six hours should be a workable standard readily complied with "in the absence of exigent circumstances."[63] This tucked-away phrase later served as an interpretative vehicle for undermining the rule's facial inflexibility and minimizing its costs.

As with pivotal trend-setting cases, the facts or context attending a new rule should not be ignored. In Mr. Davenport's case, he was charged with murder. The delay between arrest and arraignment, amounting to 19 ½ hours, was clearly attributable to police investigation and interrogation. Thus, the evil sought to be avoided was extended and avoidable prearraignment delay designed to obtain incriminating statements.

F. Insanity Instructions

Last, in 1977, the supreme court addressed the issue of jury instructions in murder cases where the defendant raises insanity as a defense. Must a jury be informed of the commitment consequences of returning a verdict of not guilty by reason of insanity? Since the 1936 decision in *Commonwealth v. Gables*,[64] Pennsylvania courts had answered this question in the negative.

When Mr. Mulgrew was denied his proferred request on the issue, however, the supreme court seized the opportunity to reexamine *Gable*. Upon further reflection, the *Mulgrew*[65] court overruled *Gable* and issued the following rule: When insanity is raised as a possible defense to criminal charges, a jury *must* be instructed con-

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417 (1972), which established an evidential exclusionary rule for statements related to unnecessary delay. A three-part balancing test for determining suppression was thereafter announced in Commonwealth v. Williams, 455 Pa. 569, 319 A.2d 419 (1974). The exclusionary and *Davenport* rules were intended to implement the protections and requirements of PA. R. CRIM. P. 122, 130 and 140 concerning prompt arraignments.

62. *Davenport* cited U.S. CONST. amends. IV, VI and XIV; and PA. CONST., art. 1, §§ 8, 9 and 14.

63. 471 Pa. at 286-87 n.7, 370 A.2d at 306 n.7.

64. 323 Pa. 449, 187 A. 393 (1936).

65. Commonwealth v. Mulgrew, 475 Pa. 271, 380 A.2d 349 (1977). Six justices participated. There were no dissents.

cerning the possible psychiatric treatment and commitment of the defendant after the return of a verdict of not guilty by reason of insanity.[66] Fundamental to the creation of this rule was the belief that such an instruction assists the jury in determining the guilt or innocence of the defendant and, in the process, reduces the possibility of a compromise verdict.

Of the prophylactic rules examined thus far, *Mulgrew* was viewed as having a direct bearing on the determination of guilt or innocence. But how "mandatory," assuming that there are calibrations of such a term, was the rule? In 1982, a panel majority of the superior court, including the lower court judge who had presided over Mulgrew's initial trial, suggested in an ineffectiveness context that Mulgrew established a *per se* rule even if such an instruction were not requested.[67] As the panel majority noted, "To hold otherwise would render ineffectual the statement in *Mulgrew* that such instruction 'assist[s] the jury in properly determining the guilt or innocence of a defendant . . . [and] reduce[s] the possibility of compromise verdicts of guilty occasioned by a jury's misapprehension of 'acquitting' a defendant by reason of insanity.' "[68] Later the panel observed, "It is noteworthy that *Mulgrew* created no exceptions to its holding."[69] Such a conclusion, however, proved to be wrong.

III. *Per Se* Rules: Do Bad Rules Make Bad Law?

Change is not necessarily synonymous with revolution. Yet incremental alterations or adjustments over a span of time may indeed facilitate a recursive process to the point of elimination or total transformation. Essentially, such changes are evolutionary. But revolution is a term denoting sudden, dramatic and fundamental restructuring of a situation or condition.[70] The creation of *per se*, prophylactic and exclusionary rules during the 1972 to 1977 period represented a revolutionary modification of a small part of the criminal justice process. That revolution, however, has been met with a counterrevolution whereby dogmatic rules, once considered essential to the protections of individuals and the administration of justice, have given way to an almost opaque balancing process of decision-making.[71]

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66. *Id.* at 277-78, 380 A.2d at 352.

67. *See* Commonwealth v. McCann, 302 Pa. Super. 442, 448 A.2d 1123 (1982), *rev'd*, 503 Pa. 190, 469 A.2d 126 (1983).

68. 302 Pa. Super. at 449, 448 A.2d at 1127.

69. *Id.* at 451, 448 A.2d at 1128.

70. "Revolution" has been defined as a sudden, radical or complete change; also as an activity or movement designed to effect fundamental changes in the socioeconomic situation. WEBSTER'S NEW COLLEGIATE DICTIONARY 984 (1981).

71. The judicial aversion to such hard-and-fast *per se* rules is not unusual. Justice Larsen, for example, expressed his disapproval of the *per se* rule of Commonwealth v. Lee, 262

An examination of cases in the selected prophylactic law category indicates that there is a new vision in the criminal justice system animating the creators toward a new order. As a result, a profound reorientation of interests is occurring at an accelerated pace. From Rule 1100 to the *Mulgrew* issue, fundamental reversals of policy and practice have been witnessed. Whether these reversals are attributable to a transformation of the composition of the supreme court[72] or to an enlightened evolution in legal thinking is not clear. It is difficult to determine whether the supreme court's current thinking is philosophically or economically oriented. Do the members of the court believe that somehow the criminal justice system in Pennsylvania has strayed from the concepts of "justice;" or do they simply view the creation of *per se* rules as having reached the point of diminishing returns, as in Rule 1100 cases, where litigation has burgeoned without regard to the fundamental concerns of guilt or innocence?

Notwithstanding the impossibility of identifying the cause of the court's current thinking, one can decipher a logic or unifying vision which has been responsible, to some degree, for the disturbance in the six prophylactic law areas mentioned. The common denominator in these different, but interconnected areas, is a new vision of the concept of justice and the legal process resting on the following concerns: (1) recognition of the public's interest in the determination of guilt; (2) the need for flexibility and a "common sense" approach in the administration of justice and reduction of those rules which encumber the exercise of judicial power;[73] (3) the need to increase those tools of inquiry viewed as essential to a determination of truth, guilt and innocence; and (4) the elimination of costly procedures and "legalities" (*i.e.*, new trials, suppression) which enable defendants to exploit and play gamesmanship with the criminal justice system. These repetitive concerns, as we shall see, have pervaded the law from Rule 1100 to *Mulgrew* and have spilled over into other areas of the law. In every case, however, the retrenchment has disadvantaged the particular defendant.

Pa. Super. 280, 396 A.2d 755 (1978), requiring the testimony of an identifying witness at a pretrial suppression hearing at the risk of automatic suppression. *See* Commonwealth v. Nelson, 488 Pa. 148, 160 n.7, 411 A.2d 740, 746 n.7 (1980) (opinion in support of reversal). *Lee* was later overruled in Commonwealth v. Thompkins, 311 Pa. Super. 357, 457 A.2d 925 (1983).

72. Consider, for example, the transitions since 1977. In 1977, the supreme court was composed of Chief Justice Jones and Justices Eagen, O'Brien, Roberts, Pomeroy, Nix and Manderino; in 1980, Chief Justice Eagen and Justices O'Brien, Roberts, Nix,Larsen, Flaherty and Kauffman; and in 1984, Chief Justice Nix and Justices Larsen, Flaherty, McDermott, Hutchinson, Zappala and Papadakos. Chief Justice Roberts' tenure ended in 1983.

73. *See, e.g., infra* note 226.

A. Rule 1100

The advantage of twelve years experience with Rule 1100, as first enunciated in the unanimous opinion of *Commonwealth v. Hamilton*,[74] and the caselaw spawned by the Rule, have served to check the initial enthusiasm (at least in some circles) with which the Rule was greeted.[75] There is presently a sentiment that Rule 1100 has somehow gotten out of hand. Fortifying this viewpoint is the dislike of rules which, for some, represents nothing more than automatic or "push-button justice".

The *Hamilton* court inaugurated the new Rule out of a concern that the tremendous backlog of cases enabled defendants to "manipulate" the system through negotiation. Despite this laudatory and valid concern, manipulation continued to infiltrate the courtrooms. In a significant recent case, *Commonwealth v. Crowley*, Justice Hutchinson identified the philosophical viewpoint of the court in Rule 1100 matters as follows:

> The standards of Rule 1100 have reduced the need for defendants to revert to the somewhat ambiguous constitutional right to a speedy trial. However, it has prompted much litigation over the precise meaning of its terms. It is indeed ironic that such a substantial amount of judicial resources must now be devoted to the myriad of hearings on petitions for extensions of time and motions to dismiss filed under the rule thus further clogging already overcrowded dockets.[76]

It is questionable whether the disenchantment with Rule 1100 will lead to an eventual explicit scrapping of the written Rule and whether such a response would in any way alleviate the litigational costs experienced in speedy trial determinations.[77] Such concerns, in

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74. *See supra* note 31.

75. See Comment, *The Pennsylvania Prompt Trial Rule: Is the Remedy Worse than the Disease?*, 81 DICK. L. REV. 237 n.7 (1977), which points out that prior to *Klopfer*, the Pennsylvania constitution was construed as providing less relief than the sixth amendment guarantee. *See also* Marshall & Reiter, *A Trial Court Working with Rule 1100*, 23 VILL. L. REV. 284 (1977); *cf.* Comment, *Constitutional Right to a Speedy Trial: The Element of Prejudice and the Burden of Proof*, 44 TEMP. L.Q. 310 (1971).

It is interesting to note the burgeoning of annotations on the speedy trial rule in Pennsylvania. In the 1978 pamphlet to the Rules of Criminal Procedure (Purdon's Pennsylvania Statutes Annotated), the Rule spanned pages 244-66. In the similar pamphlet for 1984 (Purdon's Pennsylvania Statutes Annotated), the Rule covered pages 450-540.

76. Commonwealth v. Crowley, 502 Pa. 393, 399 n.5, 466 A.2d 1009, 1012 n.5 (1983); and compare note 8 therein.

77. A speedy trial is a right guaranteed by the state and federal constitutions. *See* U.S. CONST., amend. VI; PA. CONST. art. 1, § 9. *See also* Klopfer v. North Carolina, 386 U.S. 213 (1967); Barker v. Wingo, 407 U.S. 514 (1972).

Rule 1100 is not constitutional in content. Justice Nix remarked in Commonwealth v. Johnson 487 Pa. 197, 409 A.2d 308 (1979), that Rule 1100 is an administrative method designed to give substance to the constitutional guarantee of a speedy trial. *Accord*, Commonwealth v. Genovese, 493 Pa. 65, 425 A.2d 367 (1981). Where a *constitutional* right to a speedy trial has been violated, the defendant is entitled to a discharge. *See* Strunk v. U.S., 412

fact, prompted strong dissents in *Crowley*, and in *Commonwealth v. Manley*.[78] When the majority in *Crowley* reversed the superior court's order of discharge,[79] which was based on judicial delay that caused a twenty-two-day violation of the Rule, the dissent argued that the majority's view of inevitable judicial delay totally emasculated the purposes of the Rule. The dissent charged that the majority was indulging in a "charade of judicial gymnastics."[80] Again, in *Manley*, a case concerning another reversal of the superior court's order of discharge, the two dissenters voiced their concern that the court was on a path of abandoning one of its own rules of court.[81]

What separates the majority from the minority in these and other cases is the justices' philosophical difference regarding Rule 1100's purpose in the criminal justice system and its function in society. The new majority position has effectuated a redefinition of Rule 1100; in some cases, it is definition by exclusion. For example, in *Commonwealth v. Dunbar*,[82] the majority, in reversing the superior court's order,[83] noted that the purpose of Rule 1100 was "not designed to insulate the guilty" or eliminate the disadvantage to the Commonwealth by protracted delays. The *Dunbar* majority, in justifying defense counsel's failure to move to dismiss on a "then prevailing practice" rationale, expressed its clear dislike for defendants who try to exploit the Rule with tactical delays. As the majority stated, "This court will not allow the gamesmanship of a concededly guilty defendant to govern the conduct of criminal proceedings, nor will it permit a defendant, by virtue of such gamesmanship, to flaunt his guilt in the face of the judicial system, the Commonwealth, and the citizens of Pennsylvania."[84]

The Rule 1100 balancing process now takes into account the conceded guilt of the defendant, his gamesmanship, as well as the interests of society and the justice system. These interests were forcefully expressed in *Crowley* where the majority paradoxically justified judicial delay by a common sense recognition of a fact of

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U.S. 434 (1973).

As to the efficacy of rules implementing the constitutional right, see Bridges, *The Speedy Trial Act of 1974: Effects on Delays in Federal Criminal Litigation*, 73 J. CR.L. & CRIM. 50-73 (1982). The author noted that there was little reduction in case processing time and that compliance with 18 U.S.C. § 3162 (Supp. IV 1974) stemmed primarily from the frequent use of the Act's exclusion provisions. *See also infra* note 89.

78. 503 Pa. 482, 469 A.2d 1042 (1983).

79. 281 Pa. Super. 26, 421 A.2d 1129 (1980).

80. 502 Pa. 393, 408, 466 A.2d 1009, 1017. In *Commonwealth v. Genovese*, Justice Nix began his dissent with the charge that the majority sought to justify its undermining and manipulation of the Rule for the purported sake of society's interests.

81. 503 Pa. at 486, 469 A.2d at 1045.

82. 503 Pa. 590, 470 A.2d 74 (1983).

83. 301 Pa. Super. 223, 447 A.2d 622 (1982), per curiam, reargument denied (1982).

84. 503 Pa. at 600, 470 A.2d at 79 (citing Commonwealth v. Brown, 497 Pa. 7, 12, 438 A.2d 592, 595 (1981)).

legal life which generated the Rule — crowded trial dockets. In disavowing an inflexible, mechanical application of Rule 1100, the *Crowley* majority, prior to citing a law review article, articulated the view that the "criminal justice system *owes society the duty* not to abort trials."[85] The court spoke of the important public interest in the determination of guilt process and the severe costs (discharge) imposed on society for violations of the Rule. Further, the court proclaimed:

> Rule 1100 was designed to promote the administration of criminal justice within the context of our entire judicial system, not to render that system hostage to its own closed logic. The goals of efficiency and ease of administration which Rule 1100 serves are worthy; they should not be exalted at the expense of justice. Thus, in interpreting our Rule 1100, we must throw away the stopwatch and pick up the scales of justice.[86]

Thus, the prophylactic application of Rule 1100 to reduce the courts' criminal backlogs either is no longer the predominant concern or is subservient to the concern for "justice". Where the application of Rule 1100 corresponds with such jurisprudential concerns, the supreme court arguably would affirm. In *Commonwealth v. Green*,[87] for example, the court affirmed the superior court's decision that the three-and-one-half year delay did not result in a violation of Rule 1100 because under pre-*Coleman*[88] standards, the defendant had vol-

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85. 502 Pa. 393, 399, 466 A.2d 1009, 1012 (1983) (emphasis added). One should not forget, however, that the supreme court had previously stated that the Commonwealth also has an *affirmative* duty to move its cases to trial. *See* Commonwealth v. Cooley, 484 Pa. 14, 398 A.2d 637 (1979) (a pre-Rule 1100 case). *See also* Commonwealth v. Fanelli, 292 Pa. Super. 100, 436 A.2d 1024 (1981).

Almost two years before *Crowley*, the court emphasized society's interest in the Rule 1100 equation. The shift was away from the Commonwealth's affirmative obligation and the Rule's specific requirements and toward a general multifactoral definition by description of the Rule. In reversing, Justice Kauffman stated:

> So long as there has been no misconduct on the part of the Commonwealth in an effort to evade the fundamental speedy trial rights of an accused, Rule 1100 must be construed in a manner consistent with society's right to punish and deter crime. In considering matters such as that now before us, courts must carefully factor into the ultimate equation not only the prerogatives of the individual accused, but the *collective right of the community* to vigorous law enforcement as well. Strained and illogical judicial construction adds nothing to our *search for justice*, but only serves to expand the already *bloated arsenal of the unscrupulous criminal* determined to manipulate the system. Neither the language nor the spirit of Rule 1100 is inconsistent with the *logical, common sense conclusion* that the 180 days must run from the filing of the second complaint, the one which commenced this prosecution.

Commonwealth v. Genovese, 493 Pa. 65, 72-73, 425 A.2d 367, 371 (1981) (emphasis added).

86. 502 Pa. at 402, 466 A.2d at 1014. The severe cost of discharge was attacked by Professor Amsterdam in Amsterdam, *Speedy Criminal Trial Rights and Remedies*, 27 STAN. L. REV. 525 (1975). Professor Amsterdam stated that only in exceptional circumstances should discharge-with-prejudice occur.

87. 503 Pa. 278, 469 A.2d 552 (1983).

88. Commonwealth v. Coleman, 477 Pa. 400, 383 A.2d 1268 (1978) (plurality opinion

untarily and intelligently effectuated an indefinite waiver.

On the other hand, Rule 1100 discharge decisions that rest predominantly on the dual orthodox justification of protecting a defendant's speedy trial rights and reducing the system's backlog will come under careful appellate scrutiny. The dissenters in the recent spate of Rule 1100 cases relied on the orthodox viewpoint and, obviously, have not been successful. Contrary to the dissenters' urging that "objective" standards must be maintained in Rule 1100 cases, the trend is clearly toward a more flexible, subjective approach in favor of maintaining a convicted defendant within the criminal justice system. In a sense, then, the prevailing standard in Rule 1100 cases is a "totality of interests and circumstances."

Rule 1100 probably serves as an appropriate paradigm for the problems engendered by the creation of a seemingly prophylactic rule containing nonspecific, value-laden terminology.[89] The Rule, in a sense, has tried to straddle the fence. The injection of amorphous and normative standards of implementation, such as totality of the circumstances, exacerbates this dilemma and may presage the inevitable death knell of the written Rule. The case, thus far, that has come tantalizingly close to the demise of the procedural Rule, notwithstanding its facial fidelity to its requirements, is *Commonwealth v. Terfinko*.[90]

Terfinko establishes, in effect, a totality-of-circumstances approach that takes into account some almost startling criteria: the due diligence of the Commonwealth in pursuing a case to trial *after* the run-date deadline and the causative delay resulting from a defendant's assertion of his Rule 1100 rights.[91] Although the court majority considered some of the relevant facts underlying the Commonwealth's due diligence and the court system's judicial delay, the court, without explanation, shifted gear and said that "It is evident from the record of the Rule 1100 hearing that the *constitutional* standard for a speedy trial has been met in this case. . . ."[92]

The interjection of such new considerations and the unexplained constitutional focus, which is not constrained by specific time limits

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holding that waiver of Rule 1100 must be for definite time).

89. How objectively ascertainable, for example, are terms such as "due diligence" or "earliest date consistent with the extension request and the court's business?" One commentator on the federal speedy trial rule, *see supra* note 77, stated that the federal statute, which contains an "ends of justice" provision, contains no clear standards. The simplicity or mechanical nature of such speedy trial rules may be nothing more than cosmetic.

90. 504 Pa. 385, 474 A.2d 275 (1984) (rev'g 298 Pa. Super. 640, 445 A.2d 202 (1982)).

91. In *Terfinko*, the D.A. had a pending extension motion at the time of the run-date. Because the defendant refused to waive his rights under Rule 1100 when the D.A. was purportedly ready for trial, the Commonwealth had to await the disposition of the extension motion.

92. 504 Pa. at 390, 474 A.2d at 279 (emphasis added). *See supra* note 77.

or inflexible criteria, become all the more problematic with the court's refusal to consider the separate relevant time periods in the pretrial process. Previously, such periods had provided the courts with a convenient and analytically ascertainable framework with which to judge Rule 1100 compliance. The court now refuses to apply a cookbook approach to Rule 1100 analysis and instead provides the following guideline:

> Therefore, we hold the court *en banc* acted incorrectly in separately metering each step in the pre-trial process against the due diligence standard. Rule 1100 provides an overall standard of 180 days, not separate standards for each step. Its due diligence exception should be measured against the whole not its separate parts.[93]

The dismantling of a rule or the erosion of precedent may not be plainly evident where the process of change, as in Rule 1100 matters, occurs over a period of time and in terms that still profess fidelity to the rule or precedent. The passage of time and the staggering proliferation of caselaw can insensitize one to concerns about the past and future. Pressured litigators all too often are preoccupied with the "bottom line" of an opinion and with the relevant legal principle reduced to memorable simplicity. Whether the specific provisions of Rule 1100 or its precedential caselaw, such as *Commonwealth v. Mayfield*,[94] provide any less flexibility or more guidance for the bench and bar than the recent cases "interpreting" the Rule is unclear. Maybe one day down the road, a belated acknowledgment of the demise of Rule 1100 will occur. The response understandably might be "nothing lost, nothing gained." The lurking danger, however, may be the substitution of a standard more amenable to preference than analysis. In the meantime, the prophylactic application of the 180-day constraint along with the Rule's implementing criteria are still "on the books." An uneasy truce still exists. Justice Nix's peripheral comments in *Commonwealth v. Genovese* pertinently addressed the zealous and indirect attempts to modify the Rule without specifically confronting *de facto* abolition as follows:

> If there are legitimate objections as to the prescribed time

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93. *Id.* Can the sum of the parts, thus, be greater than the whole? Probably so if one views the Rule's equation in constitutional terms.

94. The court in 1976 established the standard to be applied in granting a Commonwealth's petition for extension of time under Rule 1100:

> Henceforth, the trial court may grant an extension under rule 1100(c) only upon a record showing: (1) the "due diligence" of the prosecution, and (2) certification that trial is scheduled for the earliest date consistent with the court's business; provided that if the delay is due to the court's inability to try the defendant within the prescribed period, the record must also show the causes of the court delay and the reasons why the delay cannot be avoided.

469 Pa. 214, 222, 364 A.2d 1345, 1349-50 (1976). *See also supra* notes 77, 89.

frame, or if it is improper to demand that the prosecution proceed with "due diligence" (recognizing that this term is relative and not absolute), these objections may be aired through the rule-making processes and appropriate modifications can be drafted. We should not attempt to alter the rule on a case-by-case basis or use the decisional process to provide undue allowances for prosecutorial errors.[95]

B. *Jury Trial Waiver*

The aversion to rigid, prophylactic rules is again demonstrated in the area of jury trial waiver colloquies. The mandate in *Williams*[96] and its progeny that an effective waiver must be based on the defendant's knowledge of certain essential ingredients of a jury trial is no longer absolute.

In *Commonwealth v. Carson*,[97] the court affirmed a superior court panel's decision comporting with the flexibility approach. The defendant, previously convicted of burglary and related charges in a non-jury trial, asserted ineffectiveness on the basis of a defective colloquy that omitted the "members of the community" ingredient. The issue in *Williams* had also been presented in the context of ineffectiveness. Rejecting the defendant's claim, the court stated that *Williams* did not establish a prophylactic rule requiring "talismanic questions" or a new trial whenever one of the ingredients specified in *Williams* was omitted. The court found that the omission in *Carson* did not establish a defective colloquy. Justice Nix, the author of *Williams*, concurred, but found that the colloquy was defective under "the very clear language of *Williams*."[98]

Carson did not address the post-*Williams* cases that suggested in language and result that *Williams* was intended to establish a prophylactic, new trial rule. In any event, the result in *Carson* is indicative of the anti-*per se* attitude, pro-flexibility approach in which the court will look at all the evidence in the record to determine the extent of a defendant's knowledge and intelligence in the forefeiture of his rights.

C. *Guilty Pleas*

The submission of a guilty plea is perhaps the most serious decision a defendant can make in his journey through the justice system.

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95. 493 Pa. at 75 n.1, 425 A.2d at 372 n.1 (1981). In this regard, one is reminded of the principle that the rules of criminal procedure are subject to strict construction. *See* Commonwealth v. Brocklehurst, 491 Pa. 151, 420 A.2d 385 (1980).

96. *See supra* note 36.

97. 503 Pa. 369, 469 A.2d 599 (1983).

98. *Id.* at 372, 469 A.2d at 600.

The significance of such a *mea culpa*, of course, goes beyond the sometimes grisly exposition of the pathological perversity of an isolated man awaiting his avenger's judgment. The guilty plea process is abbreviated justice involving, on the one hand, the forfeiture of fundamental constitutional rights and, on the other hand, economy and convenience for a system besieged with criminals awaiting trial. Since 1981, the supreme court has shown little indulgence toward those defendants who have attempted to retract their admissions of guilt on the basis of the system's noncompliance with procedural safeguards.

Commonwealth v. Minarik,[99] a plurality opinion, intimated the demise of the inflexible application of *Ingram*.[100] The sentiments expressed in *Minarik* may have provided the groundwork for the subsequent pivotal opinions in *Commonwealth v. Shaffer*,[101] and *Commonwealth v. Martinez*.[102] The plurality opinion of *Minarik* refused to apply an inflexible *Ingram* standard to a guilty plea tendered prior to *Ingram*, notwithstanding the fact that retroactive application of *Ingram* was applied in *Commonwealth v. Minor*[103] in 1976. Minarik, who had allegedly killed his sleeping fiancé with an ax before the eyes of her helpless mother,[104] tried to withdraw his plea because during the colloquy proceeding he was not provided with an outline of the legal elements of the various degrees of criminal homicide in understandable terms. In acknowledging the error of *Minor*, the plurality expressed certain concerns that were aired more fully later in *Shaffer* and *Martinez*. As Justice Larsen stated,

> [A]llowing guilty pleas like the one here in question to be withdrawn on purely technical grounds would indeed have a negative effect on our system of criminal justice. The guilty plea in this case was valid in both form and substance when it was accepted in 1971: to allow the withdrawal of such a plea would plainly elevate form over substance. To allow the withdrawal of such a plea would permit a criminal defendant to flaunt, in the face of the trial court, that court's failure to comply with rules of procedure that were not then in existence, and it would leave the trial court to question its efforts in the administration of justice, in the face of sweeping decisions which undermine its plea proceedings because of its inability to predict changes in the law years before they occur. . . .[105]

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99. 493 Pa. 573, 427 A.2d 623 (1981), *cert. denied*, 454 U.S. 859 (1981).
100. *See supra* note 44.
101. 498 Pa. 342, 446 A.2d 591 (1982).
102. 499 Pa. 417, 453 A.2d 940 (1982).
103. 467 Pa. 230, 356 A.2d 346 (1976), reargument denied.
104. This fact was noted by the court. The case serves as another example of the court's particular sensitivity, understandably so, to the brutality of certain crimes.
105. 493 Pa. at 580, 427 A.2d at 627.

Then, in diminishing the significance of the lower court's failure to advise the defendant of the elements of the crime, the plurality opinion reiterated a far-reaching general standard of competency:

> [C]ompetence to plead guilty depends upon whether the defendant has "the ability to comprehend his position as one accused of [murder] and to cooperate with his counsel in making a rational defense" and whether he has "sufficient ability at the pertinent time to consult with his lawyers with a reasonable degree of rational understanding, and [has] a rational as well as factual understanding of the proceedings against him."[106]

Commonwealth v. Shaffer abandoned the *per se* application of *Ingram* in favor of a "totality-of-circumstances" test. The court, without dissent, observed that the court's opinions in this area could never have reflected an intent "to relinquish its traditional power to consider certain circumstances surrounding the entry of the plea."[107] Disavowing any intent to abolish the elements-of-the crime requirement of *Ingram*, the court nevertheless refused to permit a post-sentence withdrawal of guilty pleas for murder and other crimes. While the court believed that "blind adherence to a *per se* rule would not, in this case, comport with any notion of remedying 'manifest injustice,' "[108] notably, the totality test was applied in a situation where the guilty plea was tendered *after* the defendant had already gone through two days of trial, including presentation of the Commonwealth's case and two defense witnesses. Aside from the court's insight that the defendant essentially received a good deal[109] and was initially satisfied with his sentence, the accompanying concurring opinion expressed dislike for legal technicalities and complexities, a theme that was to be reiterated in *Martinez*.

The reductionist approach to the *Ingram* controversy was again cogently demonstrated in *Martinez*.[110] In *Martinez*, the defendant had not received a recitation of the elements of the crimes or malice. The colloquy produced evidence of the defendant's admission of his complicity in the fatal beating as well as detailed testimony by a forensic pathologist regarding the nature of the wounds inflicted. The relationship between a recitation-of-the-facts-of-the-crime and the elements requirement is still frustratingly unclear with respect to

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106. *Id.* at 582, 427 A.2d at 628.

107. 498 Pa. at 351, 446 A.2d at 596. The totality test was approved in Henderson v. Morgan, 426 U.S. 637 (1976), to determine whether a defendant was informed of the *substance* of the charges as opposed to its technical elements.

108. 498 Pa. at 349, 446 A.2d at 594.

109. The benefits accruing to a defendant, such as a sentence that is not too harsh, is a factor that has appeared in recent cases. *See, e.g.*, Commonwealth v. Newell, 486 Pa. 474, 406 A.2d 733 (1979), (involving an ineffectiveness context); Commonwealth v. Anthony, ___ Pa. ___, 475 A.2d 1303, (1984) (involving the attempted withdrawal of a guilty plea).

110. 499 Pa. 417, 453 A.2d 940. *See supra* note 102.

the sufficiency of notice received by the defendant. The court, again without dissent, found the "graphic illustration of the nature of the injuries" sufficient to demonstrate malice. As the *Martinez* court noted, "We need not explain the equation to the accused in technical terms when there is evidence understood by the accused attesting to the act itself."[111] An "esoteric explanation of the elements of the crime" was not necessary to effectuate a constitutionally valid plea. Aside from the trend toward "totality-of-the-circumstances" flexibility and simplicity in dealing with defendants who seek new trials on procedural grounds, the lone concurring opinion offered a curious and fascinating sentiment in the wake of *Ingram's* demise:

> '[T]he evolving patchwork of colloquy requirements places an onerous burden of uncertainty on the trial court, and affords numerous grounds for challenge to the content of the colloquy . . .' *Until we devise a standard colloquy*, uncertainty will persist in the lower courts, and our appellate dockets will be choked with the frivolous appeals which our present *ad hoc* system invites.[112]

One solution toward eliminating uncertainty is the creation of *per se* rules. But such an approach is precisely the one that others had erroneously believed to exist in the first place. It is possible that the discarding of *per se* rules will eventually ricochet? If so, the question remains: In what form?

D. The Interested Adult Rule

Kevin Christmas was approximately seventeen years and eight

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111. 499 Pa. at 423, 453 A.2d at 944. Justice McDermott's concurrence in *Shaffer*, stated that there was no need to give a defendant a short law school course on the nature of the charges. "Adding more elements to the colloquy in order to clarify the procedures for the defendant only increases the complexity which causes the confusion." 498 Pa. at 355 n.1, 446 A.2d at 598 n.1.

Following *Martinez*, the supreme court, in an ineffectiveness context, refused to permit the withdrawal of a guilty plea attempted eight years after the adjudication of guilt. Noting the overwhelming evidence of guilt and the favorable result obtained by the defendant, Justice McDermott used the case as an opportunity for some "plain talk" about guilty pleas. He wryly observed that a guilty plea is not a "ceremony of innocence" and that the defendant is before the court "to acknowledge facts." Further, quoting Justice Flaherty in *Shaffer*, *supra* note 101, he stated:

> The true constitutional imperative is that the defendant receive real notice of the true nature of the charge against him the first and most universally recognized requirement of due process.

Commonwealth v. Anthony, ___ Pa. ___, ___, 475 A.2d 1303, 1306 (1984). Anthony tried to withdraw his plea on the basis that he was not advised of the unanimity requirement. Nevertheless, one need only return to *Ingram* to remind oneself that, at one time, the factual basis for the plea and the elements of the crime were considered and treated as separate elements which had to be satisfied on the record. *See supra* notes 44-45.

112. 499 Pa. at 426, 453 A.2d at 945 (emphasis supplied). The demise of *Ingram* and the *per se* approach was made clear in Commonwealth v. Schultz, ___ Pa. ___, 477 A.2d 1328 (1984).

months of age when he was arrested with 744 packets of heroin. Kevin was the son of a police officer, who had an opportunity to consult privately with him for fifteen minutes before Kevin gave his incriminating statements. A superior court panel majority, assuming *arguendo* the father's interest as a police officer did not defeat his interest as a parent, nevertheless concluded that the *per se* rule of *McCutchen*[113] had been violated because the police did not inform the father of his son's constitutional rights before the consultation. Therefore, the court ordered suppression of Kevin's statements and a new trial. The panel, however, was reversed.[114]

Christmas gave the supreme court another opportunity to discard a *per se* rule in favor of a somewhat modified totality-of-circumstances[115] technique in interpreting and applying *Miranda*[116] principles to juvenile defendants. Central to the court's decision was its judgment that a *per se* rule did not serve society or justice well.

> Indeed, upon re-examination of the *per se* rule promulgated by *McCutchen*, we believe that protection of juveniles against the innate disadvantages associated with the immaturity of most youth may well be achieved in a manner that affords more adequate weight to the interests of society, and of justice, while avoiding *per se* applications of the interested and informed adult rule that serve, in an overly protective and unreasonably paternalistic fashion, to provide means for juvenile offenders to secure suppressions of confessions in fact given in a knowing, intelligent, and voluntary manner.[117]

The concurring opinion of two other justices also underscored this normative conclusion.[118]

Thus, the *McCutchen* rule was overruled — without dissent — in order to rectify the paternalism of the past and consider the interests of society and the justice system in the creation and application of flexible rules of interpretation. Two important results emerged from the process: the arsenal of tools of inquiry was again less sub-

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113. *See supra* note 53.

114. Commonwealth v. Christmas, 502 Pa. 218, 465 A.2d 989 (1983) (rev'g 281 Pa. Super. 114, 421 A.2d 1174 (1980)).

115. The totality test was modified because it was encumbered by a presumption of incompetency upon proof of an absence of an opportunity for consultation. The presumption, however, could be rebutted by evidence clearly demonstrating that the juvenile was in fact competent. Justice Larsen's concurrence, joined by Justice McDermott, rejected the presumption device and stated that it was really no presumption at all since the Commonwealth has the usual burden of proving a voluntary waiver by a competent youth. *Christmas*, 502 Pa. at 225-26, 465 A.2d at 993-94.

116. Miranda v. Arizona, 384 U.S. 436 (1966).

117. 502 Pa. at 223, 465 A.2d at 992.

118. The result reached in *Christmas* should not have surprised anyone since there were intimations of abolition in two cases where the court was equally divided. *See* Commonwealth v. Nelson, 488 Pa. 148, 411 A.2d 740 (1980); Commonwealth v. Veltre, 492 Pa. 237, 424 A.2d 486 (1980).

ject to depletion with the removal of an automatic suppression device and the chance of an adjudged defendant's playing potentially costly gamesmanship with the system was minimized.

Within seven months of *Christmas*, however, the unanimous consensus on the interested adult controversy eroded when a court majority, upon further reflection, decided in *Commonwealth v. Williams*[119] that the presumption aspect of the new totality test had to be eliminated in favor of an unrestrained totality-of-circumstances test. Eric Williams, almost eighteen years of age and charged with robbery, had been able to confer privately with his father *before* the *Miranda* warnings were given, but Eric argued that he should have been given an opportunity for private consultation after the warnings and that the failure should compel suppression. The court majority rejected Eric's arguments and repeated its aversion to the prior paternalistic and unnecessarily protective *per se* rule. The majority further felt that the nascent compromise, that is, the presumption alternative of *Christmas*, served no useful analytical purpose.[120] The new totality test, expansive in application,[121] was thus employed to respond to the majority's current intellectual and philosophical reservations.

The new procedural rule, however, demonstrated the tenuous compromise upon which *Christmas* had been based. The dissenters[122] in *Williams* resorted to the atavistic, *per se* approach and resurrected *McCutchen*. In their return to the prophylactic, suppression-of-evidence remedy resulting from a violation of a defendant's rights, the dissenters raised some serious questions about the adequacy of the new test, the ease of application and the potential impact upon the efficient functioning of the judicial system. The dissenters failed to address the societal costs of the new approach, namely, an automatic suppression of relevant evidence. Nevertheless, the continuing clash of values concerning the balancing of society's and a defendant's rights in the interested adult controversy, one can argue, has largely been inspired by nonlegal considerations. Chief Justice Nix, in this regard, verbalized a pertinent observation when

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119. ___ Pa. ___, 475 A.2d 1283 (1984) (aff'g 309 Pa. Super. 63, 454 A.2d 1083 (1982)).

120. Compare, for example, the analytical function of some of the components of Rule 1100 which appear to have been interpreted away by the court in Commonwealth v. Terfinko, *supra* note 90.

121. The new totality test takes into consideration the following factors: defendant's age, intelligence, experience with the criminal justice system, prior criminal record, physical and mental condition at the time of arrest; absence of any abuse, coercion, threats or promises; time and detention before confession; and opportunity to consult with an adult.

122. Chief Justice Nix and Justice Zappala dissented. As suggested, the unanimity of *Christmas* proved to be misleading. A justice of the Illinois Supreme Court once remarked that many opinions fail considerably to accurately reflect the state of mind of the court which rendered the opinion. *See* Schaefer, *Precedent and Policy*, 34 U. CHI. L. REV. 3 (1966).

he said that the "attack upon *McCutchen* has in large measure been inspired by the heinous nature of the crimes the juvenile is capable of committing."[123]

E. Prearraignment Delay

The most direct response to an unworkable or unpalatable *per se* rule is to simply overrule it. A less drastic alternative is to diplomatically create exceptions to the rule or redefine the rule by imposing previously unexpressed conditions. The caselaw in the area of prompt arraignment demonstrates the former approach; a recent case on the not-guilty-by-reason-of-insanity issue exemplifies the latter. In the former, incriminating statements are retained in the adjudicatory process and the expense and risk of a new trial are avoided. In the latter, the same cost/risk benefit is obtained. Beyond this benefit, however, the imposition of conditions provides an opportunity to suggest the possibility of an expanded scope of inquiry in the determination of guilt. This scope of inquiry represents a potentially recursive process that could undermine the rationale for the existence of the rule itself.

The unanimous opinion in *Davenport*[124] contained the seed of its own modification. In a footnote, the *Davenport* court observed that the six-hour rule was a workable one and could readily be complied with "in the absence of exigent circumstances."[125] This dormant statement later provided the basis for a strong retort to those who asserted the inflexibility of *Davenport's* rule, issued, one might add, in the context of a nineteen-and-one-half hour delay. *Commonwealth v. Jenkins*[126] rejected the idea that *Davenport's* intent was to establish an inflexible *per se* rule. In refusing to divorce the six-hour rule from its purpose, Justice Nix asserted that the underlying objective has always been to discourage the obtaining of incriminating information through coercive means. Nevertheless, for some, reinterpreting the rule in light of its purpose was not sufficient. The concurring opinion advocated the abolition of the inflexible rule, which was denigrated as a "classic of technicality."[127]

Commonwealth v. Keasley[128] similarly demonstrates the two divergent viewpoints. In *Keasley* there was a twelve-hour delay caused by the unexpected absence of the arraignment judge whose clerk had suffered a heart attack. The record indicated that the police dili-

123. ___ Pa. at ___, 475 A.2d at 1290 (1984).
124. *See supra* note 60.
125. 471 Pa. at 286-87 n.7, 370 A.2d at 306 n.7.
126. 500 Pa. 144, 454 A.2d 1004 (1982).
127. *Id.* at 152, 454 A.2d at 1008. Justice McDermott had expressed the same view in Commonwealth v. Bennett, 498 Pa. 656, 450 A.2d 970 (1982) (concurring opinion).
128. 501 Pa. 461, 462 A.2d 216 (1983).

gently sought a substitute judge. The supreme court ruled that the exigent-circumstances exception applied.[129] The concurrence, however, again advocated the rule's demise on the basis that it undermined the "truth-determining process" and resulted in the exclusion of constitutionally permissible statements.

The exigent-circumstances exception received a more direct endorsement in *Commonwealth v. Travaglia*.[130] In *Travaglia*, a first degree murder prosecution had been delayed by a forty-mile distance between the place of arrest and the place of arraignment. The court acknowledged that "although initially stated as mandatory," judicial interpretation has subjected the *Davenport* rule to an exigency qualification. Under the circumstances of this case, the court felt compelled to be practical and to consider the "temporal and spatial realities." The exception was acknowledged, the rule was applied, and the evidence was not excluded.

F. Insanity Defense Instructions

Commonwealth v. McCann[131] involved a defendant who had horrible destructive rape fantasies. One day he allegedly enacted some of his fantasies by stabbing a woman twenty times. There was no question in this case that the defendant was a highly dangerous person. Defense counsel in the case had failed to request a *Mulgrew* instruction on the consequences of a not-guilty-by-reason-of-insanity verdict. Interpreting the *Mulgrew* case as establishing a *per se* rule, the superior court panel awarded the defendant a new trial.[132]

The supreme court reversed and considered the *Mulgrew* issue in an ineffectiveness context. The supreme court said that "upon request" was a predicate to a *Mulgrew* instruction.[133] *Mulgrew*, which the court said must be read in the context of its facts,[134] did not establish a *per se* rule.

The ineffectiveness resolution, however, is more problematic because some of the observations could serve to eventually undermine the rule itself. The supreme court, in rejecting the ineffectiveness

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129. The lower court and the appellate panel, 301 Pa. Super. 597, 447 A.2d 639 (1982), ruled that the prompt arraignment requirement had not been met and thus ordered suppression.

130. 502 Pa. 474, 467 A.2d 288 (1983).

131. 503 Pa. 190, 469 A.2d 126 (1983).

132. *See* 302 Pa. Super. 442, 448 A.2d 1123 (1982).

133. *Cf., e.g.*, Commonwealth v. Carter, 502 Pa. 433, 466 A.2d 1328 (1983), in which the supreme court, in a murder case, clarified the lower court's obligation to charge on the unreasonable belief aspect of voluntary manslaughter. Aside from relevancy and evidentiary foundation requirements, the court stated that such an instruction must also be specifically requested; there is no obligation on the court to charge on its own. At one time a trial court had a duty in a capital case to charge a jury on all essential questions of law. *See* Commonwealth v. McCloskey, 273 Pa. 456, 117 A. 192 (1922).

134. There was a request for such an instruction in *Mulgrew*.

claim, noted that commitment is not automatically mandatory after a not guilty/insanity verdict. Specifically, however, the court further stated that counsel's inaction was reasonable because the request for such an instruction would have given the district attorney an opportunity to argue the possibility of the defendant's early release. Such a consideration, assuming its validity, would have been factually plausible in this case because the defendant had been previously released from a mental hospital.[135] The legal predicate for such an argument, however, is not free from unexamined acceptance. In *Commonwealth v. Miller*,[136] the superior court stated that the defendant had been properly refused an opportunity to present expert testimony on the probable length of his commitment and treatment. The court viewed this extension of *Mulgrew* as clouding the issue of the defendant's guilt, which was the perceived concern of *Mulgrew* in the first place.

The recognition of an avenue for argument to the jury concerning speculations on commitment is the type of interpretative accretion that may serve to undermine the rule. The extension of *Mulgrew* to the sentencing process may discourage defendants to raise an important issue originally relevant only to the adjudication of guilt. The court's opinion acknowledged that it has not addressed the permissible bounds of argument on the possible length of commitment.[137] It is not clear, however, whether, in principle, the door already has been opened to such argument.

IV. Beyond the *Per Se* Category: Similar Concerns

The sentiments controlling or influencing the disposition of recent cases have not been restricted to those in the *per se* category. A spillover effect has occurred in decisions in the following areas: admissibility of demonstrative and prior criminal conduct evidence; ineffectiveness of counsel claims; and, to a lesser degree, sufficiency of evidence assessments. Throughout the recent cases in those selected areas, there appears an infiltration of particular factors influencing the legal decision to be reached: (1) the augmentation or retention of the tools of inquiry whereby relevancy successfully competes with considerations of prejudice; (2) the eradication of checkmate-type litigation caused by almost interminable postjudgment and appeal claims; and (3) a shift in emphasis away from a paternalistic attitude vis-à-vis the defendant and toward one based on considerations of practicality, common sense, and flexibility. These concerns indi-

135. See the trial court's findings of fact cited by both the majority and dissenting opinions.

136. 290 Pa. Super. 553, 434 A.2d 1282 (1981).

137. 503 Pa. at 198 n.5, 469 A.2d at 130 n.5.

cate that, as in the *per se* category, there is a fundamental adjustment in the notions of "justice" and in the perception of the criminal trial process.

A. Demonstrative and Prior Criminal Conduct Evidence

A photo of a battered victim in a bloodied pool or testimony indicating that the defendant previously committed a crime contains inherent risks to the presumed impartial determination of guilt or innocence. Although such evidence may be relevant because of its probative value, demonstrative and prior conduct evidence must always be carefully evaluated. Demonstrative evidence is cogent because it appeals directly to the senses without the intervention of witnesses and enables a jury, in a sense, to bridge a critical spatio-temporal gap. In homicide cases, photos of the victim can serve as a powerful visual communication by the deceased and express a recurring message which words can never adequately convey. Testimony concerning a defendant's criminal past can be devastatingly prejudicial because it can deflect attention from the commission of the crime charged and focus attention on what is often a legally irrelevant issue, *i.e.*, the nature and consistency of the defendant's character. Such evidence, therefore, can incite potentially destructive forces — passion and prejudice.

1. Demonstrative evidence. — The lower appellate court was reversed in *Commonwealth v. McCutchen*[138] when it ruled that the admission of two color slides of the six-year-old victim were too gruesome and inflammatory for the jury. The case involved a heart-wrenching portrayal of the brutal anal sodomy and murder of the juvenile by the fifteen-year-old defendant. The slides, portraying an unclothed, frontal view of a bloodied skull and gashes, and a close-up view of the buttocks and torn anus,[139] were taken in the course of a post-mortem examination and were used to supplement the verbal testimony of the medical examiner. Before dimming the lights in the courtroom, the lower court judge carefully prepped and cautioned the jury on what they were about to see.[140] The slides' depiction lasted approximately thirty-six seconds.

The majority of the specially designated appellate court panel, including Justice Nix,[141] concluded that the slides did not satisfy the

138. 499 Pa. 597, 454 A.2d 547 (1982) (rev'g 274 Pa. Super. 96, 417 A.2d 1270 (1979)).

139. See particularly the superior court's factual narrative, *supra* note 138.

140. *See* 499 Pa. at 600-01 n.4, 454 A.2d at 548 n.4.

141. In order to expedite the backlog of homicide appeals, the supreme and superior courts had a brief arrangement providing for special superior court panels to adjudicate some of the homicide appeals pending in the supreme court. The arrangement, referred to as the

"essential evidentiary value" balancing test since the medical examiner had been able to convey the facts to the jury and since the obvious motive was to appeal to the jury's passions. Citing *Commonwealth v. Scaramuzzino*,[142] in which the trial judge erroneously admitted fourteen color slides (including depictions of the removed heart of the victim, the nude body covered in dried blood, and glass rods in the victim's wounds) to support the pathologist's testimony, the panel reversed the defendant's murder conviction and awarded a new trial.

In reversing, the supreme court acknowledged the inflammatory aspects of the slides, but said that they were admissible for the purpose of establishing a motive (sodomy) for the killing and the brutality of the beating. The court disagreed with the lower appellate court's value judgment of the relevancy/prejudice equation as follows:

> To permit the disturbing nature of the images of the victim to rule the question of admissibility would result in exclusion of all photographs of the homicide victim and would defeat one of the essential functions of a criminal trial, inquiry into the intent of the actor. . . . In assessing the intent of the actor in a case of criminal homicide, be it to inflict serious bodily injury or to kill, *the fact finder who deals in such an intangible inquiry must be aided to every extent possible.*[143]

The significance of *McCutchen* rests not in its disagreement with the inferences drawn by the appellate court below, but in its application of an "essential evidentiary value" balancing test weighted in favor of a potentially expansive notion of relevancy emphasizing intent. There is no doubt that prior caselaw theoretically permits the admissibility of inflammatory[144] photographs when they may be relevant to the jury's understanding of the alleged crime, the defendant's connection and his intent.[145] Courts have admitted in-

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"Special Transfer Docket" included the assignment of judges form the supreme, superior and lower court judges to sit on the three member superior court panels.

142. 455 Pa. 378, 317 A.2d 225 (1974). The essential evidentiary value test was applied in Commonwealth v. Petrakovitch, 459 Pa. 511, 329 A.2d 844 (1974), in which the court suggested that the following visual considerations were relevant: the position of the body, whether facial features were contorted and the presence or profusion of blood. *See also* Commonwealth v. Powell, 428 Pa. 275, 241 A.2d 119 (1968).

143. 499 Pa. at 602, 454 A.2d at 549 (emphasis added). Consistent with this expansive view of the search for truth is Commonwealth v. Brinkley, ____ Pa. ____, 480 A.2d 980 (1984), giving the Commonwealth a right to discovery of defense counsel's memoranda regarding witnesses' statements.

144. The two-step analysis of relevance-versus-prejudice applies with respect to photos that are *inflammatory*. Relevance is the criterion for *non*-inflammatory evidence. *See, e.g.*, Commonwealth v. Hubbard, 472 Pa. 259, 372 A.2d 687 (1977); *but cf.* Commonwealth v. Petrakovitch, 459 Pa. 511, 329 A.2d 844 (1974) (dissent arguing a balance test also for non-inflammatory photos).

145. *See, e.g.*, Commonwealth v. Petrakovitch, *supra* note 144; Commonwealth v. Sny-

flammatory photos when the photos were black and white or clinical in nature without portrayal of the victim's face;[146] and when the photos served to clarify sharply conflicting testimony[147] or demonstrated the physical facts attending the victim's murder.[148] Nevertheless, Justice Pomeroy's concurrence in *Commonwealth v. Hubbard*[149] is worthy of remembrance. Justice Pomeroy cautioned that when inflammatory photographic evidence is involved, the "essential evidentiary value" test should always mean more than mere relevance, especially when such evidence, as intimated by the *McCutchen* court, is cumulative in nature. The *McCutchen* case, however, seems to make relevance the prevailing consideration even when the demonstrative evidence is arguably cumulative. The approach is reminiscent of that taken in *Commonwealth v. Snyder*,[150] where the court's pro-admissibility ruling rested on the acknowledgement that the horrid and gruesome nature of evidence is never a sufficient ground alone for inadmissibility — a picture of one in death is never pleasant or aesthetic.

2. Prior criminal conduct evidence. — Defendants asserting claims that they were prejudiced by evidence of their prior criminal conduct suffered similar defeats in three recent cases in their attempts to gain new trials. The relegation of the "gruesome" or "inflammatory" factor to a subordinate position was demonstrated in *Commonwealth v. Travaglia*.[151] The case involved a direct appeal from the lower court following convictions of first-degree murder for

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der, 408 Pa. 253, 182 A.2d 495 (1962), *cert. denied*, 371 U.S. 504 (1963). *Petrakovitch*, however, suggests that the visual evidence therein may not have been necessarily inflammatory. There is no *per se* rule that photos of corpses are inflammatory. *See* Commonwealth v. Hubbard, *supra* note 144; Commonwealth v. Woodward, 483 Pa. 1, 394 A.2d 508 (1978).

146. *See* Commonwealth v. Hudson, 489 Pa. 620, 414 A.2d 1381 (1980) (black and white photo showing victim in pool of blood without portrayal of the face); Commonwealth v. Hubbard, *supra* note 144 (color slides of victim with no evidence of blood or contorted features but with suggestion by the court that they did not fit in the inflammatory category); Commonwealth v. Snyder, *supra* note 145 (photos of deceased without evidence of the bloodied head portion).

147. Commonwealth v. Petrakovitch, *supra* note 144, where there was sharply conflicting evidence as to how the shooting occurred.

148. Commonwealth v. Snyder, *supra* note 145 (photos admitted to show the location of the points of entry); Commonwealth v. Hudson, *supra* note 146 (photos admitted to show area where crimes were committed and position of corpse in a noninflammatory context); Commonwealth v. Hubbard, *supra* note 144 (photos, apparently noninflammatory, admitted to indicated manual strangulation).

149. Commonwealth v. Hubbard, *supra* note 144.

150. Commonwealth v. Snyder, *supra* note 145. See also Commonwealth v. Garcia, ___ Pa. ___, 479 A.2d 473 (1984), where the lower court selectively admitted three black and white photos of the murder weapon (meathook), murder victim (portions of the body not revealed) and the drag marks transversing a pool of blood on the floor of the grocery store where the murder occurred. These photos were relevant to indicate the ferocity of the attack and a reconstruction of the facts of the murder. There is a suggestion of potential inflammatory aspects but no prejudice assessment.

151. 502 Pa. 474, 467 A.2d 288 (1984).

the killing of a police officer. The Commonwealth introduced testimony from its witness about the defendants' criminal acts (abduction and shooting) preceding the officer's murder. The court ruled that the testimony of the prior acts was admissible and relevant to the issues of the defendants' motive and intent because the defense claimed that the shooting of the officer was an accident. Then, in *dictum*, the court addressed the propriety of such evidence at the *penalty* phase. The court ruled that there was no reason for exclusion if there was no embellishment or improper attempt. In the court's opinion, "[w]here facts are relevant for a proper purpose at trial, defendants may not be heard to complain about the horrid character of such facts."[152]

The development and expansion of pro-admissibility principles in the crucial phase of a homicide trial, *i.e.*, the penalty phase,[153] were more directly demonstrated in *Commonwealth v. Zettlemoyer*.[154] In *Zettlemoyer*, the Commonwealth was permitted to recite evidence of indictments against the defendant in another criminal proceeding for the purpose of establishing "aggravating circumstances"in sentencing. Truly, the issue implicated life or death, not guilt or innocence. The Commonwealth's reading of the indictments extended to include the *facts* recited in the indictments. The supreme court said that the neutral reading of the facts of the indictments, followed by cautionary instructions, was permissible. The court noted, however, that the result might have been otherwise if the indictments had been "loaded" with inflammatory or gory details.[155]

As in *McCutchen*,[156] the supreme court again disagreed with the inferences drawn from potentially prejudicial photographic evidence. In *Commonwealth v. Reiss*,[157] three separate references to the display of photographs of the victim by an investigator at a police station shortly after the incident were viewed as merely "passing" and nonprejudicial. The references came from the victim, the police officer, and the lower court in its charge. The general rule, of course, is that the prosecution may not introduce evidence of the defendant's prior criminal conduct as substantive evidence of the defendant's guilt. Once it is determined that a jury could conclude,

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152. *Id.* at 494, 467 A.2d at 298.

153. In homicide cases, the penalty phase literally involves a matter of life or death. See, for example, Justice Hutchinson's dissent and his comments about the importance of effective representation at the penalty phase in Commonwealth v. Stoyko, 504 Pa. 455, 475 A.2d 714 (1984). A death sentence is subject to automatic review by the supreme court. *See* 42 PA. C.S.A. § 9711(h) (Purdon Supp. 1982-1983).

154. 500 Pa. 16, 454 A.2d 937 (1982), *U.S. reh. denied*, 104 S. Ct. 31 (1983).

155. 500 Pa. at 53 n.21, 454 A.2d at 956 n.21.

156. *See supra* notes 53, 138.

157. 503 Pa. 45, 468 A.2d 451 (1983) (rev'g 301 Pa. Super. 96, 447 A.2d 259 (1982)).

from photographic references, that there has been prior criminal conduct on the part of the defendant, then prejudicial error has been committed.[158] The superior court majority held that the comments were not passing references because the jury was advised of the place of identification (police headquarters) and number of pictures involved in the display (two packs of pictures, fifty per pack) without any explanation about how the pictures came into the possession of the police. The supreme court majority, on the other hand, stressed that there was no use of a mugshot epithet or specific identification of the source of the photos. The dissenters, characterizing some of the suggested inferences as ludicrous, found prejudicial error warranting a new trial.

B. Ineffectiveness of Counsel

Ineffectiveness issues have raised two important familiar considerations: gamesmanship and depletion of valuable, but limited, judicial resources. In many legal circles, the sentiment is prevalent that postconviction collateral litigation[159] has become unnecessarily burdensome and unmanageable. The skepticism and criticism engendered by such issues have been harsh.[160]

The court in *Commonwealth v. Crowley*[161] faced the spectre of a drastic remedy when a Rule 1100-based ineffectiveness claim was presented. Ordinarily, meritorious ineffectiveness claims result only in a new trial, a costly remedy that still keeps a convicted defendant outside of free society. With Rule 1100/ineffectiveness claims, however, the remedy is discharge. It is significant, therefore, that when the supreme court established a constitutional standard[162] for assessing Rule 1100 ineffectiveness claims, it interjected its view that ineffectiveness litigation can lead to "perversions of the adversary system" created by result-oriented practitioners at a great cost to the interests of justice and society. And when faced with a fourth postconviction petition, in which the lower appellate court reversed and remanded for an evidentiary hearing, the supreme court in *Common-*

158. *See* Commonwealth v. Allen, 448 Pa. 171, 292 A.2d 373 (1972).

159. *See* Post Conviction Hearing Act (referred to as PCHA), Act of Jan. 25, 1966, P.L. (1965) 1580, No. 554, 19 P.S. §§ 1180-1 et seq. Repealed by Act of May 13, 1982, P.L. 417, No. 122, § 2 as amended, 42 PA.C.S.A. §§ 9541 et seq. (Purdon Supp. 1984-1985).

160. *See, e.g.*, Justice Black's dissent in *Kaufman v. U.S.*, 394 U.S. 217, 235, 242 (1969); Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 U. CHI. L. REV. 142 (1970), cited by Justice Flaherty in Commonwealth v. Watlington, *infra* note 173. *See also* Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 HARV. L. REV. 441 (1963). Consider also Justice Larsen's comments about so-called Catch-22 ineffectiveness claims and "bogus" ineffectiveness tactics in Commonwealth v. Stoyko, ___ Pa. ___, ___ n.7, 475 A.2d 714, 724 n.7 (1984). *Stoyko* was argued twice in 1983.

161. 502 Pa. 393, 466 A.2d 1009 (1983).

162. *See* Barker v. Wingo, 407 U.S. 514 (1972).

wealth v. Parker,[163] condemned such an abuse of collateral review to perpetuate meritless cases and said that it must be eradicated.

The shift in emphasis goes beyond the obvious philosophical disenchantment with ineffectiveness abuse. There is also a noticeable alteration of the applicable standard that almost approaches a totality-of-the-circumstances analysis. The seminal case of *Commonwealth ex rel. Washington v. Maroney*[164] established that the inquiry focuses on whether the particular course chosen by counsel had some reasonable basis designed to effectuate his client's interests. In *Commonwealth v. Dunbar*,[165] reversing the superior court's order of discharge, the court expressed a subtle variant of the standard: whether in light of the alternatives available to counsel, the strategy actually employed was *so unreasonable* that no competent lawyer would have chosen it.[166] The supreme court in *Dunbar* resorted to practicalities of time and common sense, based on the concept of a "then-prevailing practice," to reject an ineffectiveness claim.

In two other cases, ineffectiveness claims were not limited to an assessment of the alternatives not chosen, but were expressed in the context of the evidence of guilt. In the multiple (fourth) petition case of *Commonwealth v. Parker*,[167] the supreme court initially observed that the proferred ineffectiveness claim was not relevant to defendant's guilt or innocence and would make no difference to the outcome of his trial. The *Parker* court noted further that it was not oblivious to the "overwhelming evidence of defendant's guilt."[168] Previously, in *Commonwealth v. Vogel*,[169] when the defendant sought a fourth new trial, the court noted that Mr. Vogel unques-

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163. 503 Pa. 336, 469 A.2d 582 (1983) (rev'g 229 Pa. Super. 68, 445 A.2d 151 (1982)). Three justices concurred in the result.

164. 427 Pa. 599, 604, 235 A.2d 349, 352-53 (1967).

165. 503 Pa. 590, 470 A.2d 74 (1983). Three justices concurred in the result.

166. *Maroney* was not expressed in those terms but such a view was intimated in that opinion, 427 Pa. at 605 n.8, 235 A.2d at 353 n.8, and shortly thereafter in Commonwealth v. Hill, 427 Pa. 614, 617, 235 A.2d 347, 349 (1967).

167. *See supra* note 163.

168. Such references to sufficiency of evidence, in the context of adjudicating a disputed procedural issue, have been made with increasing frequency. Note, however, that on ineffectiveness claims, the Pennsylvania Supreme Court in 1978 stated that a harmless error standard was *not* appropriate. Commonwealth v. Badger, 482 Pa. 240, 393 A.2d 642 (1978). *But see infra* note 173.

Notwithstanding *Badger*, the supreme court has considered the prejudicial impact of a counsel's ineffectiveness. *See* Commonwealth v. Johnson, 490 Pa. 312, 416 A.2d 485 (1980); Commonwealth v. Wade, 480 Pa. 160, 172, 389 A.2d 560, 566 (1978).

The element of prejudice in ineffectiveness cases is conceptually problematical. *See, e.g., Maroney*, 427 Pa. at 599 n.8, 235 A.2d at 353 n.8. The Pennsylvania Superior Court recently acknowledged a "prejudice component" in the analysis of ineffectiveness issues. *See* Commonwealth v. Garvin, ___ Pa. Super. ___, 485 A.2d 36 (1983). *See also* Bines, *Remedying Ineffective Presentation in Criminal Cases: Departures from Habeas Corpus*, 59 VA. L. REV. 927, 949-52 (1973). *See infra* note 173; *Strickland*, 104 S. Ct. 2052, 2067-69, *infra* notes 175-76.

169. 501 Pa. 314, 461 A.2d 604 (1983), *cert. denied*, ___ U.S. ___, 104 S. Ct. 1603 (1984).

tionably caused the death of two individuals in the course of a robbery.[170] Before proceeding to a brief resolution of the defendant's ineffectiveness argument, the court rejected his double jeopardy claims as proferred by a "misguided sense of 'fairness'."[171] In language that may have been influential in perhaps placing the ineffectiveness claim in a more skeptical perspective, the court said, "[m]oreover, we may not ignore the obligation to the citizenry of this Commonwealth to assure that those who violate our laws will be held criminally responsible for the pain and suffering resulting from their behavior."[172]

Whether the perceived obligations to the citizenry will eventually compel a fundamental restructuring of the philosophy and function of collateral review is uncertain. During Chief Justice Eagen's tenure, two justices advocated limiting collateral review to claims constituting a denial of fundamental fairness significantly implicating the "truth determining process."[173] And in *Commonwealth v.*

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170. *Id.* at 317, 461 A.2d at 605.

171. *Id.* at 327, 461 A.2d at 611.

172. *Id.* at 328, 461 A.2d at 604. There may be, of course, a number of factors fueling discontent with ineffectiveness claims: (1) the volume and repetitiveness of such claims as perceived by the public and the judiciary; (2) the ability of a defendant to have a claim, in effect, repeatedly re-litigated by placing it in a new (ineffectiveness) context, *see, e.g.*, Commonwealth v. Hare, 486 Pa. 123, 404 A.2d 388 (1979), and Commonwealth v. Vogel, *supra* note 169 (where the P.C.H.A. court granted the defendant a fourth trial); (3) the judiciary's perceived role in assuring that convicted defendants assume full and final responsibility for their crimes, see *Vogel*, *supra* note 169, and the court's reluctance perhaps to vacate a sentence once such responsibility has been adjudicated; and (4) the costs inherent in the award of a new trial remedy following a finding of ineffectiveness of counsel. All of these considerations are arguably tangential to a defendant's constitutional right to the effective assistance of counsel, a right which is applicable to all the states. *See* Gideon v. Wainwright, 372 U.S. 335 (1963).

173. Justice Flaherty, joined by former Justice Kauffman, stated the problem bluntly:

> It is time for the Court to realize that we have inadvertently created a monster of inefficiency and judicial wastefulness in our past interpretations of the PCHA. That convicted prisoners, as a routine matter, should file endless petitions was never contemplated under the PCHA.

Commonwealth v. Watlington, 491 Pa. 241, 249, 420 A.2d 431, 435 (1980).

As in the other issues addressed herein, concerns about costly or unpalatable remedies can be mollified through a process of *reformulating* the substance or procedure of a given right. In ineffectiveness cases, one need not address directly the problem of remedy in order to secure a re-alignment of values; one need only re-design the legal equation. For example, the burden of proof upon a defendant can be altered and, in the process, increased or made more difficult; likewise, defense counsel's action can be viewed with greater deference (*see, e.g.*, *supra*, text accompanying note 166). In *Strickland*, the Supreme Court articulated an ineffectiveness standard which will likely impose substantial practical and procedural burdens upon a defendant who asserts that counsel deprived him of his constitutional right to effective assistance. *See infra* notes 175-76.

One should not minimize the significance or potential impact of such procedural modifications. In a simulated appellate argument in the Supreme Court of the State of Heursia, counsel for the defense, Mr. Brook, pertinently addressed the impact of a procedural modification of the *M'Naghten* rule on insanity as follows:

> Mr. Brook: The burden of persuasion, in the law, is a very functional mechanism. It allows, or requires, the finder of fact to resolve uncertainties against the party who bears this burden of proof, so that a legal dispute can be finally resolved. It is the law's means of achieving finality in the face of uncertainties. The decision concerning who must bear the risk of nonpersuasion, i.e., the party

Parker, even the reversed superior court panel majority acknowledged the vexing problem of multiple petitions and the urgent need for reform.[174] In this regard, it is perhaps important to consider the United States Supreme Court's recent articulation of the standard governing assistance of counsel claims under the Sixth Amendment. Contrary to caselaw in this jurisdiction, the United States Supreme Court stated in *Strickland v. Washington*[175] that, in addition to proof that a lawyer's performance "fell below an objective standard of reasonableness," the defendant must also prove the "reasonable probability" of a different result. For the time being, a defendant in Pennsylvania must show only a claim of arguable merit and the absence of a reasonable basis for counsel's course of action. As mentioned previously, the shift in emphasis in the terminology of the defendant's burden of proof may have significant practical consequences. Notably, in this regard, Justice O'Connor concluded that "[t]he benchmark for judging any claim of ineffectiveness must be whether counsel's conduct *so undermined* the proper functioning of the adversarial process that the trial cannot be relied on as having

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> who will not prevail at a legal proceeding unless the finder of fact is sufficiently certain about his contentions, reflects a societal judgment about the relative disutility of arriving at an erroneous decision. In a criminal case, of course, two types of errors might be made: acquitting an individual who is factually guilty and convicting a defendant who is actually not guilty. Our society has made the fundamental value judgment that the latter is the more serious error, and the Supreme Court has thus required that the prosecution prove all facts necessary to constitute the alleged crime beyond a reasonable doubt. And it is not just the magnitude of the burden of persuasion which is critical, but, more fundamentally, who must bear that burden. In this context, when the state burdens the defendant with proving his insanity by a preponderance of the evidence, that amounts to a value judgment that, in cases of uncertainty, society has opted to criminally punish those who may well be mentally ill, and not responsible for their actions, and thus not deserving of punishment because they are not truly blameworthy. This is a perversion of acceptable social values and a manifest misuse of the burden of persuasion as a legal instrumentality. (footnotes omitted)

See Acker, *Social Sciences and the Criminal Law*, 20 CR. L. BULL. 321, 335 (1984).

In Pennsylvania, the courts have occasionally modified the traditional two-prong test of ineffectivness (existence of an arguably meritorious claim and the absence of a reasonable basis for counsel's action), *see Maroney*, *supra* note 164, and Commonwealth v. Smith, 498 Pa. 661, 450 A.2d 973 (1982), by imposing additional considerations and burdens. If a defendant has failed to demonstrate prejudicial harm or a causal connection between the alleged ineffectiveness claim and a particular adverse result, the court may deny the claim. *See* Commonwealth v. Ford, 491 Pa. 586, 592, 421 A.2d 1040, 1043 (1980); Commonwealth v. Johnson, 490 Pa. 312, 416 A.2d 485 (1980); Commonwealth v. Vogel, *supra* note 169; Commonwealth v. Clemmons, ___ Pa. ___, 479 A.2d 955 (1984). Likewise, an ineffectiveness claim may be unsuccessful if the record indicates that the defendant somehow received an advantageous result. *See* Commonwealth v. Newell, 486 Pa. 474, 406 A.2d 733 (1979).

The prejudice consideration interjects a significant factor facilitating a reorganization of priorities and values potentially to a defendant's detriment. The prejudice component is especially problematic because, aside from the elusive nature of such a concept and the difficulty of proof, the supreme court rejected this factor in Commonwealth v. Badger, *supra* note 168. *See also* Commonwealth v. Williams, 273 Pa. Super. 147, 416 A.2d 1132 (1979).

174. 299 Pa. Super. 68, 71-72 n.2, 445 A.2d 151, 152 n.2. *See supra* note 163.

175. — U.S. ___, 104 S. Ct. 2052 (1984).

produced a *just result.*"[176]

C. *Sufficiency of Evidence*

Although sufficiency of evidence re-assessments by the highest appellate court are infrequent, the supreme court recently reversed an insufficiency determination by the lower appellate court. As in the other legal areas, special concerns of philosophy and policy were involved.

In *Commonwealth v. Macolino*,[177] the superior court panel majority refused to infer control and intent from the fact that drugs were found in a couple's bedroom. The supreme court's reversal[178] is apparently based on what the court may have perceived as its common sense judgment of the evidence in light of all the circumstances. The supreme court stressed that the defendants had exclusive control of the residence and were alone at the time of the seizure; and evidence indicated the presence of equipment and paraphernalia associated with drugs. The defendant's wife's equal access to the constructively controlled area was not fatal, in the supreme court's view, and presented a factor distinguishable from the constellation of facts contained in the decisions[179] relied upon by the superior court. In closing, the *Malcolino* court noted that, "[a]llowing the Superior Court order to stand would provide a privileged sanctuary for the storage of illegal contraband. Simply by storing contraband in a place controlled by more than one party, a spouse, roommate, partner, would render all impervious to prosecution."[180]

One should not, however, extract a conclusion of universality

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176. *Id.* at ____, 104 S. Ct. at 2064 (emphasis added). *See also* Buba, *The Standard for Effective Assistance of Counsel in Pennsylvania — An Ineffective Method of Insuring Competent Defense Representation*, 86 DICK. L. REV. 41 (1981); Comment, *Ineffective Representation as a Basis for Relief from Conviction: Principles for Appellate Review*, 13 COLUM. J. OF L. & SOC. PROB. 1, 45 n.162 (1977); Strazzella, *Ineffective Assistance of Counsel Claims: New Uses, New Problems*, 19 ARIZ. L. REV. 443 (1977).

As the conclusion of this paper suggests, an opinion's articulation of intelligible standards serves practical and symbolic functions. One may ask whether the standards of *Strickland* provide sufficient guidelines for lower courts to assure fairness and consistency in resolving constitutional ineffectiveness claims. Justice Marshall's dissent found the majority's standard to be one of "debilitating ambiguity" and "so malleable" that, in practice, it will either have no grip at all or will yield excessive variation in the manner in which the Sixth Amendment is interpreted." ____ U.S. at ____, 104 S. Ct. at 2075, 80 L.Ed. 2d at 706. Nevertheless, is not ambiguity or unpredictability unavoidable whenever one uses or places emphasis upon terms such as "reasonable" and "prejudicial?" See Note, *A New Focus on Prejudice in Ineffective Assistance of Counsel Cases: The Assertion of Rights Standard*, 21 AM. CR. L. REV. 29 (1983).

177. 302 Pa. Super. 96, 448 A.2d 543 (1983), reargument en banc denied.

178. 503 Pa. 201, 469 A.2d 132 (1983).

179. *See, e.g.*, Commonwealth v. Davis, 444 Pa. 11, 280 A.2d 119 (1971); Commonwealth v. Tirpak, 441 Pa. 534, 272 A.2d 476 (1971); Commonwealth v. Fortune, 456 Pa. 365, 318 A.2d 327 (1974); Commonwealth v. Chenet, 473 Pa. 181, 373 A.2d 1107 (1977).

180. 503 Pa. at 210, 469 A.2d at 136.

from one isolated case. In two other cases,[181] the supreme court disagreed with a panel's sufficiency-of-evidence assessment and reversed convictions when two equally reasonable and conflicting inferences existed.[182]

V. Counter-point for the Defense

The dimensions of the changes in criminal law cannot be properly appreciated unless one takes into account those responses which fall outside a suggested pattern. The difficulty with most theories is that there are always plausible exceptions that necessarily modify one's point of view. And so it is with the defendant's turf in criminal law. To conclude that the recent supreme court is inflexibly "pro-Commonwealth" in orientation would be a serious mistake. Many of the so-called "pro-defendant cases" (for want of a better term), actually have been advanced by one or two justices who are popularly considered to be philosophically conservative (*i.e.*, more prosecution-oriented) in criminal matters. An examination of those cases indicate that, as in the previous discussion, certain concerns preponderate. For purposes of momentary simplification, the following observations can be made about such pro-defendant cases: (1) the supreme court has demonstrated a marked sensitivity to errors that have occurred in the areas of self-incrimination, substantial misconduct by the prosecution in the course of trial, and attempts by the Commonwealth to achieve what is essentially a "second bite at the apple;" (2) ineffectiveness will be found where there was no conceivable benefit in counsel's course of action; and (3) new trials will be awarded when the lower court is guilty of a clear mistake or misapprehension of law.

It is impossible to ascertain the precise balancing process when

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181. See Commonwealth v. Keblitis, 500 Pa. 321, 456 A.2d 149 (1983) (rev'g 281 Pa. Super. 633, 425 A.2d 840 (1980)), where the court reversed the defendant's conviction of manufacture of marijuana in light of evidence that there was equal accessibility to the garden by three others. The analysis therein is compatible with that in *Macolino*.

The other case, Commonwealth v. Tribble, 502 Pa. 619, 467 A.2d 1130 (1983) (rev'g 302 Pa. Super. 595, 448 A.2d 1174 (1982)) is more troublesome. The court reversed a conviction for theft of movable property because the inferences flowing from the presence of fingerprint evidence were equally reasonable and conflicting.

182. The supreme court has, on other occasions, either affirmed lower courts' insufficiency of evidence determinations or reached the same result by reversing sufficiency determinations. *See, e.g.*, Commonwealth v. Dolfi, 483 Pa. 266, 396 A.2d 635 (1979) (convictions for conspiracy and violation of lottery statute); Commonwealth v. Mason, 483 Pa. 409, 397 A.2d 408 (1979) (affirmance regarding defendant police officer's demurrer as to alteration of firearms charge); Commonwealth v. Sandusky, 484 Pa. 388, 399 A.2d 347 (1979) (superior court's reversal of sentence, regarding conspiracy to commit misdemeanor in office, affirmed); Commonwealth v. Konz, 498 Pa. 639, 450 A.2d 638 (1982) (reversal and discharge with respect to legal issue of spouse's duty to seek medical care for ill spouse); Commonwealth v. Derr, 501 Pa. 446, 462 A.2d 208 (1983) (insufficient evidence of criminal conspiracy concerning drug sale); Commonwealth v. Gallo, 473 Pa. 186, 373 A.2d 1109 (1977) (reversal and discharge in theft by deception prosecution).

the court determines that a trial has been fundamentally unfair or counsel's action so unreasonable as to deprive the defendant of the effective assistance of counsel. One notices, however, that if a mistake has occurred in the context of a case involving minimal evidentiary support to convict (*e.g.*, no eyewitnesses) or evidence that is crucial to conviction, then reversal for a new trial is not a remote possibility.[183] In many cases, articulation of the "harmless error" computation is either nonexistent or problematic. The difficulty in identifying and applying the balancing process vis-a-vis the particular facts of the case was adverted to by Justice Roberts in the seminal case of *Commonwealth v. Story*[184] in 1978. *Story* established the following uniform rule for a determination of harmless error from the appellate court's perspective:[185] "[A]n error cannot be held harmless unless the appellate court determines that the error could not have contributed to the verdict. Whenever there is a 'reasonable possibility' that an error 'might have contributed to the conviction,' the error is not harmless."[186] When the evidence of guilt is "overwhelming", *Story* made clear the stringency of its new standard:

> Unless the evidence claimed to be overwhelming is uncontradicted we cannot conclude, beyond a reasonable doubt, that a jury would have resolved the conflicts in the same manner absent the improperly admitted evidence. Thus, we hold that, in applying the overwhelming evidence test to determine if an error is harmless, a court may rely only on uncontradicted evidence. The uncontradicted evidence of guilt must be so overwhelming, and the prejudicial effect of the improperly admitted evidence so insignificant by comparison, that it is clear beyond a reasonable doubt that the error could not have contributed to the verdict.[187]

This standard, for the moment at least,[188] applies to errors based on federal and state law. The application of this standard, as well as the standard of ineffectiveness, can only be understood in relation to the particular facts of a case.

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183. For example, the supreme court reversed for a new trial in Commonwealth v. Smoyer, ____ Pa. ____, 476 A.2d 1304 (1984), where the lower court had improperly admitted hypnotically induced testimony which concerned the crucial issue of causation.

184. 476 Pa. 391, 383 A.2d 159 (1978). *Story* was based on Chapman v. California, 386 U.S. 18 (1967).

185. In Commonwealth v. Norris, 498 Pa. 308, 316 n.5, 446 A.2d 246, 250 n.5 (1982), Justice Hutchinson suggested that the *Story* standard is perhaps more appropriate to apply to a fact-finder's judgment than that of an appellate court's review of errors of law. *See also* R. TRAYNOR, THE RIDDLE OF THE HARMLESS ERROR, 20-21 (1970); Saltzberg, *The Harm of Harmless Error*, 59 VA. L. REV. 988 (1973).

186. 476 Pa. at 409, 383 A.2d at 164.

187. *Id.* at 416-17, 383 A.2d at 168.

188. *See supra* note 185.

A. Self-incrimination

The supreme court has recognized that a reference to a defendant's right to silence[189] may be prejudicially reversible error notwithstanding the issuance of cautionary instructions. In a voluntary manslaughter case extending protections beyond federal constitutional limits,[190] the supreme court ruled that the prosecution could not use the defendant's silence at the time of arrest to impeach his version of events. In *Commonwealth v. Turner*,[191] the defendant for the first time gave an exculpatory version of the shooting during cross-examination. The prosecutor then asked, "[d]id you ever tell the police that somebody was shooting at you?" Although the lower court instructed the jury to disregard the question, Justice Flaherty noted that the resulting prejudice was substantial because "there exists a strong disposition on the part of lay jurors to view the exercise of the Fifth Amendment privilege as an admission of guilt. . . ."[192]

Particularly, one should note that Turner was the only one who presented exculpatory evidence. Thus, in this 4-to-3 decision, the court ruled that under the Pennsylvania Constitution, the existence or absence of *Miranda* warnings preceding the post-arrest silence should not affect a person's legitimate expectation not to be penalized for exercising the right to remain silent. Refusing to speculate on the actual effect of the impermissible reference, the majority granted a new trial because the error might have contributed to the verdict.

The rationale and result in *Turner*, however, prompted two of the dissenters to reiterate familiar concerns about retiring "more of the small tools available to the truth testing process" and the distortion of the Constitution "into a manual for escape artists to ward off every possible threat."[193] The significance of the majority's rationale, nevertheless, may rest with the fact that the reference to silence occurred at the *guilt* phase of the trial. In *Commonwealth v. Travaglia*,[194] a first degree murder case involving the shooting of a policeman, the prosecutor, without undue attention, commented to the jury at the *sentencing* phase about a codefendant's taking the stand and not showing remorse. The other codefendant (nontestifying) maintained that such an argument implied that he also had a burden to take the stand and show remorse. The supreme court rejected these arguments because the guilt and sentencing phases are substantially

189. PA. CONST., art. 1 § 9; U.S. CONST. amend. V.

190. *See* Fletcher v. Weir, 455 U.S. 603 (1982) (permitting the use of evidence of silence before the *Miranda* warnings for purposes of impeachment).

191. 499 Pa. 579, 454 A.2d 537 (1982).

192. *Id.* at 582, 454 A.2d at 539.

193. *Id.* at 588, 454 A.2d at 542.

194. 502 Pa. 474, 467 A.2d 288 (1983).

different with the presumption of innocence having no direct application to the latter phase.[195]

In an ineffectiveness of counsel context, the privilege against self-incrimination afforded the basis for a new trial when testimony by two Commonwealth witnesses, admitted without objection, served to spotlight the accused's failure to take the stand. The Commonwealth, in *Commonwealth v. Tann*,[196] had two crucial witnesses who were present at the scene of the crime and, as a result of a plea bargain, offered to testify against Tann. Preceding the witnesses' damaging testimony, however, the Commonwealth presented the testimony of the witnesses' *attorneys*, who made repeated references to their clients' voluntary and cooperative waiver of their rights to remain silent. Justice Larsen, speaking for a unanimous court, found such testimony to be "absolutely irrelevant and highly objectionable." Since the accused was associated with the witnesses, Justice Larsen noted that the testimony bolstered the witnesses' credibility through a tactic which emphasized to the jury that the defendant had the same opportunity to waive his rights. As a result of counsel's failure to object, the murder conviction, involving a racial confrontation, was reversed. Arguably, however, no conceivable benefit inured to the defendant as a result of counsel's inaction.

B. Commonwealth's Unfair Advantage

1. Prosecutorial misconduct. — The power to prosecute is an awesome one. When the Commonwealth has improperly exercised such power, in fact or manner, reversal for the defendant may result. Four recent cases illustrate this point.

Reversal has, for example, occurred when the Commonwealth has exceeded permissible bounds of prosecution either through actual prosecutorial misconduct or prejudicial conduct through one of its witnesses. *Commonwealth v. Percell*[197] required the supreme court to find that the defendant was denied a fair trial. Throughout the course of the defendant's second (four week) trial, the prosecutor repeatedly was admonished by the court for asking improper questions of a key defense witness. The questions were improper because they suggested that the defense was harboring an unreliable witness capable of suppressing the truth and perverting the criminal justice system. Because the prosecutor, in effect, scorned the trial court's rulings about the inadmissibility of the witness' prior criminal charge and the defendant's prior criminal record, notwithstanding limiting

195. *Id.* at 499, 467 A.2d at 300-01.
196. 500 Pa. 593, 459 A.2d 322 (1983). *See also infra* text accompanying note 212.
197. 499 Pa. 589, 454 A.2d 542 (1982).

instructions, the superior court's affirmance[198] of defendant's convictions was reversed, subject, however, to a single dissent.[199]

Commonwealth v. Wallace[200] was a death penalty case in which the prosecutor failed to correct false testimony of its chief star witness and to provide the defendant, upon his request, with information regarding a witness' criminal background and record. Noting that the district attorney had an affirmative and continuing duty to disclose exculpatory evidence relating to its chief witness *and* to correct false *material* testimony, the supreme court unhesitatingly concluded that "where the suppressed evidence might have affected the outcome of the trial,"[201] a new trial was required. Particularly condemned was the prosecutor's unilateral decision to ignore the defense's discovery request rather than challenge it.[202]

Finally, in another more problematic case concerning prosecutorial misconduct during the course of trial, statements by a prosecution witness (a detective) about what an assistant district attorney said to the defendant ("I think you did it.") provided the basis for a new trial. The superior court panel in *Commonwealth v. Di Nicola*[203] found the exchange to be a minor and harmless occurrence during the course of a four day trial. Two children and one adult died of a fire of incendiary origin. DiNicola was convicted of arson and three counts of second degree murder. The supreme court majority[204] recognized that there was sufficient circumstantial evidence to convict but found that the indirect personal opinion testimony to be irrelevant to any issue in the case and inadmissible hearsay. The new trial result in this case rests largely on a judgmental conclusion of reversible prejudice without any further explanation of harmless error considerations.[205]

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198. 274 Pa. Super. 152, 418 A.2d 340 (1979). The homicide case was placed on the superior court's Special Transfer docket. *See supra* note 141.

199. Justice McDermott noted:

> To read the over three thousand pages of testimony, replete with the care and patience Judge Geisz exercised, leaves no doubt that this defendant received a fair trial and was convicted by overwhelming credible evidence. To suggest that the passage of time dulled the trial judge's memory of the texture and fabric of that trial is an arch gratuity. To make his careful admonitions to counsel, admonitions that he never conceived as subjected to scornful disobedience, a basis for a new trial is to my mind unsupportable and accordingly I dissent.

499 Pa. at 597, 454 A.2d at 546-47. *See also supra* note 168.

200. 500 Pa. 270, 455 A.2d 1187 (1983).

201. *Id.* at 279, 455 A.2d at 1192.

202. *See* PA. R. CRIM. P. 305.

203. 308 Pa. Super. 535, 454 A.2d 1027 (1982), reargument denied.

204. 503 Pa. 90, 468 A.2d 1078 (1983). There were two dissents. The Commonwealth filed a petition for reconsideration, which was denied.

205. Justice McDermott's dissent, citing Commonwealth v. Upsher, 497 Pa. 621, 444 A.2d 90 (1982), emphasized the brevity of the prosecutor's exchange of remarks (during the four day trial with 19 witnesses) and the absence of argument in the summation. He found no prejudicial reversible error.

2. Improper prosecution. — The supreme court previously had given indications of disapproval with the Commonwealth's attempts to obtain an unfair advantage in relitigating an issue or reprosecuting a defendant.[206] Occassionally, the supreme court has referred to this practice as a "second bite" of the apple.[207]

The "second bite" philosophy was extended to the area of probation revocation hearings in *Commonwealth v. Brown.*[208] The issue in *Brown* was whether a defendant could have his probation revoked *after* he had been acquitted of the offense giving rise to the revocation proceedings. The superior court panel[209] acknowledged a minority view supporting a collateral estoppel argument against revocation, but applied the majority position based on the differences in the nature of the inquiry in the two proceedings and the focus of revocation as an effective rehabilitative tool. Nevertheless, the supreme court characterized the Commonwealth's purposeful delay in seeking revocation as an improper second-bite relitigation of a common issue of ultimate fact: namely, did the defendant commit the subsequent offense? In the majority view,[210] a contrary result would be "unseemly" and fundamentally unfair. Essential to the result was the almost cosmic view of criminal justice as representing an "intermeshing" and harmonious system. Thus, *Brown* illustrates the reluctance to use procedural niceties or differences to justify what is perceived to be a fundamentally unfair loss of liberty.[211]

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206. *See, e.g.*, Commonwealth v. Campana, 452 Pa. 233, 304 A.2d 432 (1973), *vacated and remanded*, 414 U.S. 808 (1973), on remand, 455 Pa. 622, 314 A.2d 854 (1974), *cert. denied*, 417 U.S. 969 (1974). *See also* Commonwealth v. Hude, 500 Pa. 482, 458 A.2d 177 (1983) (no subsequent prosecution based on same criminal episode); Commonwealth v. Tillman, 501 Pa. 395, 461 A.2d 795 (1983) (Commonwealth cannot appeal after judgment of acquittal); Commonwealth v. Virtu, 495 Pa. 59, 432 A.2d 198 (1981) (no re-trial where prior trial involved prosecutorial over-reaching in calling witness who had claimed privilege against self-incrimination); 18 PA. C.S.A. §§ 109-111 (Purdon Supp. 1983-1984) (prosecution barred by former prosecution); Ashe v. Swenson, 397 U.S. 436 (1970). *But cf.* Commonwealth v. Beatty, 500 Pa. 284, 455 A.2d 1194 (1983) (prior summary offense prosecution no bar to trial for misdemeanor or felony offense). The operative constitutional concern in these cases is double jeopardy.

207. *See, e.g.*, Commonwealth v. Ackridge, 492 Pa. 90, 422 A.2d 487 (1980); Commonwealth v. Ehredt, 485 Pa. 191, 401 A.2d 358 (1979). *Cf.* Commonwealth v. Dobson, 486 Pa. 299, 405 A.2d 910 (1979) (defendant not entitled to relitigate suppression issue); Commonwealth v. Berkheimer, 501 Pa. 85, 460 A.2d 233 (1983) (defendant entitled to reconsideration of suppression motion in the interests of justice).

208. 503 Pa. 514, 469 A.2d 1371 (1983).

209. *See* Commonwealth v. Brown, 281 Pa. Super. 348, 422 A.2d 203 (1980).

210. Justices McDermott and Hutchinson dissented.

211. *But cf.* Commonwealth v. Crenshaw, 504 Pa. 33, 470 A.2d 451 (1983) (evidence at first trial, resulting in acquittal, was not barred at second trial for different offense where evidence of common scheme and defendant's confession were not pivotal to jury's determination in first trial).

C. *Ineffectiveness of Counsel*

In addition to *Commonwealth v. Tann*,[212] in which counsel failed to object to improper testimony impinging upon the accused's constitutional right to remain silent, the supreme court has indicated its willingness to find ineffectiveness of counsel in other cases. Three cases suggest that ineffectiveness will be found, and a new trial awarded, when counsel's action or inaction has been particularly egregious, without any intelligible underlying rationale, or when counsel's conduct concerned an important issue in the case.[213]

In *Commonwealth v. Jones*,[214] for example, counsel for the defendant, who was charged with first degree murder, erroneously introduced evidence of his client's prior criminal record in the mistaken belief that the Commonwealth could use such evidence to prove the existence of a common scheme, habit or motive. The prior crimes concerned aggravated assault and terroristic threats.[215] Defense counsel believed that the introduction of such evidence would establish defendant's truthfulness and integrity, although, as the supreme court noted, his character was not put in issue. Based on counsel's misunderstanding of the law of evidence, a new trial was awarded.

The supreme court reversed a superior court panel in *Commonwealth v. Boykin*[216] because, upon retrial, defense counsel failed to make a timely motion for severance. In a prior trial, Boykin had been partially acquitted. Upon retrial, with his codefendants, Boykin would have been prejudiced by the admission of evidence of those crimes of the other defendants for which he had been acquitted. The supreme court majority, subject to three dissents, saw no potential benefit or strategy justifying counsel's tardy action in seeking severance.[217]

The critical nature of neglected evidence provided the basis for an ineffectiveness-based new trial in a first degree murder/death

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212. *See supra* note 196.

213. The court, of course, first determines whether the proposed ineffectiveness issue presents arguable merit. *See* Commonwealth v. Jennings, 285 Pa. Super. 295, 427 A.2d 231 (1981).

214. 499 Pa. 522, 454 A.2d 8 (1982). Defendant was convicted of voluntary manslaughter.

215. Since these crimes did not concern defendant's veracity and since his character or reputation was not at issue, this evidence would have been inadmissible. *See Jones*, 499 Pa. at 526 n.1, 454 A.2d at 10 n.1.

216. 501 Pa. 250, 460 A.2d 1101 (1983) (rev'g 276 Pa. Super. 56, 419 A.2d 92 (1980)).

217. In Commonwealth v. Smith, 495 Pa. 362, 433 A.2d 1349 (1981), the court found ineffectiveness when defense counsel made an untimely request for severance. The distinction between *Smith* and *Boykin* is that in the former the defendant had a statutory right, *see* Act of March 31, 1860, P.L. 427, § 40, 19 P.S. § 785, repealed by Act of April 28, 1978, P.L. 202, No. 53 § 2(a), to be tried individually. *See also* Commonwealth v. Von Smith, 486 Pa. 564, 406 A.2d 1034 (1979).

penalty case. The focus of the ineffectiveness, however, was an interesting one. Counsel for the defense in *Commonwealth v. Smith*[218] was found to be ineffective because he failed to respond more fully to the lower court's limitation upon the defendant's right to cross-examine a crucial key witness. Apparently, the key witness may have been the one responsible for the murder. This possibility was underscored by evidence that the female witness had previously confessed to another killing, which, in the supreme court's view, bore striking similarities to the one for which Smith was on trial. Whereas counsel in *Boykin* did "too little, too late," counsel in *Smith* provided his client with the basis for a new trial because he, in effect, had not done enough. Three justices, incidentally, concurred in the result.

D. Errors of Law

When the lower court, in the supreme court's view, has misapplied the law, the supreme court may order a new trial or reverse the lower court.[219] The lower court, for example, in *Commonwealth v. Cooper*,[220] erroneously informed the defendant in a jury trial waiver colloquy that *he* would have to convince twelve jurors of his innocence. Such positive misinformation resulted in a *per curiam* reversal of the lower court majority[221] and the award of a new trial.

In two cases, the supreme court's interpretation of statutory law resulted in decisions favoring the defendant. The supreme court, in the context of a case without any eyewitnesses, ruled that the defendant in *Commonwealth v. Pollino*[222] was denied a fair trial because the lower court failed to charge the jury that the defendant did not have a duty to retreat. The case involved a prosecution of an apparently diminutive man claiming self-defense against a larger club-wielding antagonist. Citing lower appellate court cases for the proposition that one is under no duty to retreat when attacked, the supreme court reversed for a new trial. Then, in *Commonwealth v. As-*

218. 502 Pa. 600, 467 A.2d 1120 (1983).

219. An error of law, however, will not necessarily result in a new trial. The lower court in one case gave an undisputed erroneous instruction on self-defense which placed the burden of proof on the defendant. The jury convicted the defendant of murder and the superior court granted a new trial because of the erroneous instruction. Commonwealth v. Simmons, 312 Pa. Super. 501, 459 A.2d 14 (1983) (reargument denied). The supreme court, after describing Simmons as a "feckless ruin of juvenile gang war," reversed because in its view there was insufficient evidence to support the charge in the first place. *Simmons*, 504 Pa. 565, 475 A.2d 1310 (1984). The point of departure between the two appellate courts were their different interpretations of a statement given by the defendant as a basis for the instruction on self-defense. *Cf.* Commonwealth v. Carter, 502 Pa. 433, 466 A.2d 1328 (1983) (defendant not entitled to particular voluntary manslaughter instruction where there is no evidence to reasonably support it).

220. 503 Pa. 29, 467 A.2d 1301 (1983).

221. 308 Pa. Super. 607, 454 A.2d 162 (1982).

222. 503 Pa. 23, 467 A.2d 1298 (1983).

kin,[223] the supreme court disagreed with the lower court's interpretation of the limitations' statute for conspiracy. The "plain language" interpretation resulted in a *per curiam* reversal of Askin's conviction for conspiracy.

VI. Conclusion: The Content and Communication of Justice

Predictability was identified initially as a desirable goal in the process of interpreting and applying the law. The discussion thus far represents an attempt to take a segment of the Commonwealth's criminal jurisprudence and extrapolate some common concerns that perhaps gave direction to the law at a given period. It would be a smug conceit or pious deception, however, to conclude that principles of universality or logic control all cases. Uncertainty in the law, as Justice Cardozo once observed, is inevitable.

> I was troubled in spirit, in my first years upon the bench, to find how trackless was the ocean on which I had embarked. I sought for certainty. I was oppressed and disheartened when I found that the quest for its was futile. I was trying to reach land, the solid land of fixed and settled rules the paradise of a justice that would declare itself by tokens plainer and more commanding than its pale glimmering reflections in my own vacillating mind and conscience. . . . As the years have gone by, and as I have reflected more and more upon the nature of the judicial process, I have become reconciled to the uncertainty, because I have grown to see it as inevitable. . . .[224]

Once predictability and uncertainty are placed in the proper perspective, one can then proceed toward a healthier understanding of what has happened in the law. That a significant shift or re-orientation of interests has occurred is clear. Reversals of lower court decisions may represent either simple or profound, short-term or long-term deviations. Only the passage of time will determine whether such a constellation of intermittent changes will establish a cognizable pattern or merely reflect a history of fluctuating, insubstantial creeds. The magnitude, rapidity and integrity of such changes, however, cannot be minimized or ignored in considering the efficacy of the legal process. Thomas Sowell spoke about such deviations in this way:

> In criminal law, as in other social processes, there are inherent constraints of circumstances and human beings, and these constraints entail trade-offs. The repugnance and pain

223. 502 Pa. 575, 467 A.2d 820 (1983) (modifying 306 Pa. Super. 529, 452 A.2d 851 (1982)).

224. B. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 529 (1921).

> which a conscientious person feels at the thought of imprisoning or executing an innocent man, or letting a guilty sadistic murderer go scot-free back into society on a technicality, in no way removes [sic] the constraints or relieves the essentiality of tradeoffs. The ideal of "a government of laws and not of men" implies an established process rather than *ad hoc* judgments of what is right in each case. Inherent in this are deviations between the particular consequences of a systemic process and the individual results most in accord with the principles that the process was meant to embody. The more effective the legal processes, the smaller are these deviations, but in any process conceived and carried out by human beings there will be deviations — and in some cases, extreme deviations. Legal systems try to reduce these extreme deviations by allowing appellate courts to review cases. But to some extent this recreates the original dilemmas of trial court systems at the appellate court level.[225]

The deviations witnessed in the all too brief period of Pennsylvania criminal law embody fundamentally a sociologically oriented perspective focusing on the proper role and function of law and the courts within a particular society at a given time.[226] The goals and interests expressed in many of the recent opinions have certainly been impregnably laudable. One can appreciate the response to *per se* rule-making, which some may feel restricts flexibility and puts blinders on those who have the onerous task of participating in that elusive force known as justice. One can also appreciate perhaps the reorientation toward a more collectivist rather than individualist viewpoint that attempts to identify and implement public norms and values. And again, a decision-making process, which takes into account the inherent costs (new trials, suppression of evidence, discharge of a defendant), cannot be criticized on that basis alone.[227] The net result from a sociological view is the transmission of knowl-

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225. SOWELL, *supra* note 1, at 272-73.

226. Consider particularly Pound, *The Scope and Purpose of Sociological Jurisprudence*, 24 HARV. L. REV. 489 (1911), and 25 HARV. L. REV. 489 (1912). One might also submit that the abrogation of *per se* rules has a significant political dimension in the sense of liberating judicial power from the shackles, albeit self-imposed, placed on traditional decision-making functions, such as the discovery and balancing of facts toward a selection of various possible legal conclusions. This political consideration, however, is beyond the scope of this article. Consider, for example, Commonwealth v. Shaffer, 498 Pa. 342, 351, 446 A.2d 591, 596 (1982) in which Justice Flaherty disclaimed any prior intent of the court to relinquish its traditional power to consider the circumstances surrounding the entry of a guilty plea.

227. T. Sowell observes:

> One of the most important ways in which knowledge is screened out of the criminal justice system is either by excluding it from trial or reversing the conviction in the appellate courts because it was not excluded. Evidence acquired without following minutely prescribed procedures can also be excluded, without regard to how accurate, verifiable, or relevant it may be.

SOWELL, *supra* note 1, at 272.

edge or a message to society that will perhaps produce lowered expectations[228] concerning the rights of the defendant vis-a-vis society.

Nevertheless, in the pursuit of restructuring or replacing the equations of the past, costly risks are ever-present. *First* and foremost, the danger of viewing "the defendant" as a stereotypical malefactor always exists and, consequently, in addressing the particular legal issues in a fashion, as one justice recently commented, that does not go beyond a "theoretical analysis."[229] The unappreciated pitfall, of course, is an unnecessary dilution of procedural and constitutional safeguards of that defendant — and others — in the future.

Second, one might argue that a so-called aversion to "technicalities" can be carried to a dangerous extreme. The law is necessarily built on technicalities and rules. Not all technicalities are without a valuable purpose and function. From an economist's point of view, the establishment or demolition of such technicalities can involve serious "trade-offs", as Thomas Sowell would say.

Third, in the attempt to restructure the present legal order, the danger is always present that the desire for rapid change may facilitate a disingenuous glossing over of precedent or principles of *stare decisis*. Deviations predicated on such decision-making may very well provide the type of critical fodder exemplified in the previously mentioned dispute between Professors Hart and Arnold.

Fourth, in creating or undermining precedent on the basis of exceedingly broad rules or values, we jeopardize the knowledge and transmission aspects of the legal process. On the one hand, those

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228. The following observation by Sowell is also pertinent:

> Changes in the criminal law change the effectiveness with which knowledge can be transmitted to those deciding innocence or guilt, to criminals contemplating crime, and to the voting public assessing their experience and assessing the protection offered — or not offered — by the criminal justice system.

SOWELL, *supra* note 1, at 271.

Whether changes in the law and the communication of such changes have an actual deterrent effect on crime is, of course, another separate and controversial matter. *See generally*, Kennedy, *A Critical Appraisal of Criminal Deterrence Theory*, 88 DICK. L. REV. 1 (1983).

It is interesting to note that serious crime in Pennsylvania, according to state police statistics, reportedly dropped 7.3% in 1983, the third straight year of a decline. The drop was comparable to the national average. For example, in Pennsylvania in 1983, murders dropped 14% to 583; forcible rapes 0.3% to 2,441; robberies 1.4% to 20,464; aggravated assaults 8.6% to 17,150; burglaries 9.4% to 96,378; arsons 13.4% to 3,417; and motor vehicle thefts 4.9% to 37,332. Phila. Inquirer, June 29, 1984, at 5-B, cols. 4-6. In a related matter, the Pennsylvania Commission on Crime and Delinquency (PCCD) postulated that Pennsylvania was spared 550 armed robberies and five homicides in 1982 as a result of the state law on mandatory sentencing imposing a five year sentence for crimes committed with a gun. *See* Phila. Inquirer, May 8, 1984, at 8-B, cols. 1-4.

The F.B.I. similarly stated that the number of serious crimes reported to the police in the first half of 1984 was five percent below the figure for the first six months of 1983. The half-year drop followed the first two consecutive year-long declines since 1960. Increases, however, were reported for rape, aggravated assault, motor vehicle theft, and arson. *See* N.Y. Times, October 28, 1984, p. 27, cols. 1-4.

229. *See* the dissent in Commonwealth v. McCann, 503 Pa. 190, 200, 469 A.2d 126, 130, 131 (1983).

who must understand the law before applying it may inevitably face difficulty in assessing concepts or terms that are almost impervious to rational analysis. Essentially, they will have to feel their way through the maze of justice. On the other hand, in the positing of decisions upon broad but reasonably intelligible principles, one may discover eventually that the generalized notions of today may be inadequate to meet the specific dilemmas of tomorrow.

Last, in the sincere endeavor to emasculate or abandon *per se* rules, the original intendment and actual benefits of such rules may not be appreciated. Each rule of law carries its own costs and risks accoutrement. The establishment or demolition of a rule of law necessarily involves the identification, competition and selection of priorities implicating the interests of the judicial administrative system, the rights of the defendant, the concerns of society, and the efficacy of the process designed to determine guilt and innocence. Despite the necessary consequences of repeated litigation to define the scope of any rule, it cannot be denied, for example, that *per se* rules, such as Rule 1100 and *Davenport*, have served society and defendants.

Recognizably, however, those rules have also imported special burdens into the system. Jeremy Bentham, educated as a lawyer, once addressed his readers' attention to the fundamental importance of the problem of language and decision-making in the field of law and politics. In his *Book of Fallacies*,[230] he refers to the fallacy of "allegorical idols" whereby the name of a fictitious entity (such as the "church" or "law") is conveniently used as a substitute for those who in fact make the decisions (such as the elders or lawyers). And so it is with the judiciary. It would be fallacious to presume that the "court" at any given time in history makes a decision. There is no such thing as an "institutional intent."[231] Decisions are made by human beings in a politically collective process that produces the fallacy of a consensus. Thus, it is essential to realize both the source of and factors affecting decision-making in the law. Justice Holmes had no romantic preconceptions of the law. He once stated:

> The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudice which judges share with their fellow-man, have had a good deal more to do than the syllogism in determining the rules by which men should be governed.[232]

That there can and does occur subordination of legal concepts to expediency and changing notions of justice was an "old truth"

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230. J. BENTHAM, BOOK OF FALLACIES 69-72 (1952).
231. *See, e.g., supra* note 122.
232. LERNER, *supra* note 3, at 51-52.

that Justice Cardozo said needed to be restated now and again.[233] For Cardozo, and certainly for many who today must administer and interpret the law, the final cause of law is the welfare of society whose social advantages must sometimes be taken into account. The stability of legal norms[234] may be the prevailing value for certain decision-makers. For others, the motivating force may be their concept of justice. Eugen Ehrlich's commentary on justice provides a springboard toward further reflection:

> That a certain thing is just is no more scientifically demonstratable than is the beauty of a Gothic cathedral or of a Beethoven symphony to a person who is insensible to it. All of these are questions of the emotional life. Science can ascertain the effects of a legal proposition, but it cannot make these effects appear either desirable or loathesome to man. Justice is a social force, and it is always a question whether it is potent enough to influence the disinterested persons whose function it is to create juristic and statute law.[235]

Yet such an approach, however meritorious or necessary, is not entirely satisfactory. An exaggerated reliance on justice-is-in-the-eyes-of-the-beholder philosophy can be as detrimental or self-defeating as a slavish adherence to precedent.[236] The brief epoch of *per se* rule-making raises some fundamental issues about the dynamics of decision and rule-making as well as the agenda for the future. One may ask, how intelligent and voluntary was the alliance with *per se* justice? Others, likewise, may question whether the accelerated counter-revolution against *per se* rules, flanked by certain repetitive values and concerns, reflects a rational or productive protest. Notwithstanding different philosophical viewpoints and aside from the broader issue whether judges make or discover law, has there been an empirical basis for either course of action? What, for example, is the foundation for the belief (or hope) that a speedy trial/discharge rule, encumbered by value-laden exceptions, will actually reduce

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233. B. CARDOZO, PARADOXES OF LEGAL SCIENCE 64 (1928).

234. Eugen Ehrlich spoke of the importance of the stability of legal norms in terms of the economics of decision-making and the sovereignty of the state. *See* EHRLICH, *supra* note 2, at 121-36.

235. *Id.* at 460-61. Ehrlich noted that the bulk of complaints about unsatisfactory laws concerned the functioning of norms in situations for which they were not created and to which they were not adapted.

236. Blackstone, a staunch advocate of precedent, acknowledged the limitations of precedent where a law is contrary to reason, manifestly absurd or unjust. In such circumstances, Blackstone rationalized that the law was not a bad law, but that it was simply not law and, therefore, could be ignored or overruled. 1 BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 69 (Sharswood ed. 1886). *See also* CARDOZO, *supra* note 224, at 149-56, where he observes that, at that time, there was some sentiment to abandon the principle of precedent altogether and that, at least in procedural matters, change can occur with greater freedom from precedent. *See also* Loughran, *Some Reflections on the Role of Judicial Precedent*, 22 FORDHAM L. REV. 1 (1953).

backlogs (trial and appellate), promote administrative convenience or establish uniformity? What were the underlying *assumptions*, *values* and *goals* that prompted the creation of a rule requiring a recitation of the nature of a crime and its legal elements to the defendant before the acceptance of a guilty plea? Are such requirements unreasonable or beyond the grasp of accomplishment?

On the other hand, have we explored whether, for example, the *Davenport* rule has resulted in prompt arraignments? Or did the *McCutchen* rule provide an easy workable basis for not only safeguarding a minor's rights but also for minimizing litigation on such an issue? What have been the realities of our experience?[237] Have our actions in these and other areas rested more on the ebb and flow of unassailable and unverifiable principles than on a consideration of pragmatic consequences? And if so, should there not be a frank acknowledgment? And with regard to fundamental values, is *per se* rule-making, in principle or specific application, really antithetical to our notions of justice and fairness? Can such rules ever serve a useful or limited purpose?[238]

Decision-making by an antimajoritarian branch of government in a democracy cannot isolate itself from political and societal pressures. Competence and legitimacy, concerns which forever impinge upon the integrity of the decision-making process, are determined not only by the quality of the decision-making process but also by the public's (bench, bar and populace) perception of that process. One commentator has suggested that the judicial function, in giving meaning to public values through the enforcement and creation of public norms, is constrained by two special burdens: the obligation to participate in a dialogue about the meaning of public values, and the obligation to justify a decision.[239] The insularity of the court and the

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237. These varying concerns have, to some degree, been expressed most notably in dissents by Chief Justice Nix and Justice Zappala. *See, e.g.*, Commonwealth v. Terfinko, 504 Pa. 385, 474 A.2d 275 (1984) (J. Zappala's dissent on a Rule 1100 issue); Commonwealth v. Williams, 504 Pa. 511, 475 A.2d 1283 (1984) (J. Zappala's dissent on the interested adult rule); Commonwealth v. Schultz, ___ Pa. ___, 477 A.2d 1328 (1984) (C.J. Nix's dissent on the requirements of a guilty plea colloquy); and Commonwealth v. Genovese, 493 Pa. 65, 425 A.2d 367 (1981) (J. Nix's dissent in a Rule 1100 case). Consider, for example, the study of the federal speedy trial rule based on data from the Administrative Office of the U.S. Courts, *supra* note 77.

238. Does *per se* justice exist in other forms or serve a purpose? Consider the dissent in Commonwealth v. Manley, 503 Pa. 482, 469 A.2d 1042 (1983), where the dissent interpreted the majority's Rule 1100 holding as establishing a *per se* rule. Consider also the nature and requirements of Pennsylvania's Mandatory Sentencing Act, 42 PA. C.S.A. §§ 2154, 9712-9716 (Purdon Supp. 1981-1982). In the civil area, consider Justice Larsen's guidelines in determining the amount of child support in Melzer v. Witsberger, ___ Pa. ___, 480 A.2d 991 (1984) (rev'g 315 Pa. Super. 626, 463 A.2d 28 (1983)).

239. Fiss, *The Supreme Court 1978 Term: Forward — The Forms of Justice*, 93 HARV. L. REV. 1, 13-14 (1979). The focus of the article was on constitutional values and rules. Another scholar has addressed the fundamental problem of considering the antimajoritarian function of judicial review in terms of legitimacy and traditional democratic principles. He con-

perceived obligation of being responsive to the public's values create a dynamic tension; somehow, in adjudicating particular controversies between specific parties, the court must avoid the pressures of preference and the casuistries of logic. The tension can become especially acute when the insular body-politic, unbeholden to any constituency in the traditional sense, takes upon itself the difficult task of going beyond specific controversies in enacting procedural rules or norms of pervasive impact.

Whether the court's task is one of conflict-resolution or rule-making, the obligations of dialogue and justification, applicable to both tasks, reflect nothing more than the necessity of being responsive to the needs and sometimes conflicting demands of society. It is with respect to this sensitive political dimension of the court's role in society that opinions of the court bear such crucial significance. Opinions can play both symbolic and functional roles. Functionally, opinions, although discretionary and nonessential to the legitimacy and competency of the court, serve the parties in communicating the basis for the court's action. Opinions represent, in a special sense, an official medium of communication with the public and provide an effective channel for transmitting information and facilitating knowledge of the law. Symbolically, the collective voices of an opinion serve as a visible guarantee that the court is exercising its democratically created function to adjudicate legitimately and competently. In this respect, opinions reach beyond the parochial interests of the parties before the court and speak to all of society. In an information-acquisitive and inquisitive world of mass communication, vigilance of the courts becomes a relatively easy task. Such vigilance of the courts, however, is significantly circumscribed; the focus is limited to the opinion's judgment line and, when expressed, to the logic which supports it.[240]

The opinions in the *per se* category, as well as those recent opinions addressing similar concerns, present an interlude of decision-making suggesting reflection. The benefit of hindsight in the years to come will help to provide an assessment of the functional and symbolic performance of the opinions in what one can describe as a revolutionary epoch in the law. But the rapid turn-abouts in the law, based predominantly upon generalized concerns and values, under-

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cluded that it is impossible to reconcile independent judicial review with majority rule although he recognized that judicial discretion must explore and focus on society's interests and constitutional values. *See* Chemerinsky, *The Price of Asking the Wrong Question: An Essay on Constitutional Scholarship and Judicial Review*, 62 TEX. L. REV. 1207 (1984). One might ask whether the recent emphasis in Pennsylvania cases reflects perhaps a tendency or desire to "democratize" the judicial function by making it more receptive to current majoritarian values.

240. Not relevant to this discussion is the alternative of impeachment with respect to judicial ethics.

score the importance of articulation. Recognizably, vision must precede direction. Many of the *per se* cases have demonstrated the former.[241] The revolution for and against *per se* rules, like most revolutions, has largely been a negative one promoted by felicitous phraseology, laudable goals and polemics. A glance back at many of the pronouncements of the past reveals little articulation of the empirical bases and balancing processes that promoted the creation and destruction of *per se* rules, albeit limited in number.[242] In the same regard, little focus has been given to the practical consequences of a totality approach or, what appears to be, a standardless relativism in terms of the administration of the law and the public's perceptions of it.[243] The abandonment of precedent and rules, no matter how short-lived, necessarily creates a vacuum. *Per se* rules, for example, represented, in a sense, categorical imperatives, or a standardization of justice — specific and understandable in scope and application. The stringency and definiteness of such rules constituted, as we now know, both a vice and a virtue.[244] For the thousands who must interpret and administer the law, *ad hoc* adjudication and identification of generalized concerns may be of limited utility. In the preoccupation with remedy, the functional necessity and benefit of guidelines,

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241. Many of the cases in part V, *supra*, however, demonstrate a careful identification and analysis of predominating values and legal factors.

242. The absence of empirical support for a decision has concerned others. Justice Stevens' dissent in Hudson v. Palmer, 104 S. Ct. 3194 (1984), criticized the majority's resolution of a prison inmate's search and seizure claim with the observation that the majority's

> . . . perception of what society is prepared to recognize as reasonable is not based on any empirical data; rather, it merely reflects the perception of the four Justices who have joined the opinion that THE CHIEF JUSTICE has authored.

104 S. Ct. at 3212.

243. The appearance of what is said and done, as well as the perceptions of the bench, bar and public, is recognizably important. In Illinois v. Gates, 462 U.S. 213, 76 L.Ed. 2d 527 (1983), Justice Brennan dissented as to the application of a totality test in assessing a search warrant's probable cause based on an anonymous informant's tip. Frankly acknowledging that fourth amendment rights are particularly difficult to protect because their advocates are usually criminals, Justice Brennan nevertheless cautioned that the constitutional rules were designed to protect the innocent and guilty alike. Addressing the interaction of articulation and values, Justice Brennan stated:

> The Court's complete failure to provide any persuasive reason for rejecting *Aguilar* and *Spinelli* doubtlessly reflects impatience with what it perceives to be 'overly technical' rules governing searches and seizures under the Fourth Amendment. Words such as 'practical,' 'nontechnical,' and 'commonsense,' as used in the Court's opinion, are but code words for an overly permissive attitude towards police practices in derogation of the rights secured by the Fourth Amendment.

Id. at ____, 76 L.Ed. 2d at 582. *See also supra* note 176. Many of the Supreme Court's opinions in criminal law during the 1983-84 term have sparked considerable criticism suggesting that such decisions were based more on preferences and ideology. *See, e.g.*, N.Y. Times, July 15, 1984, sec. 4, p.2, cols. 1-2, which speaks in Cardozo-like terms of the conservatives' "predilections and prejudices, instincts and emotions;" and N.Y. Times, July 8, 1984, pp. 1, 18, which addresses the conservatives' influence in the Court.

244. The dilemma was aptly noted in a Rule 1100 context in Comment, *The Pennsylvania Prompt Trial Rule: Is the Remedy Worse than the Disease?* 81 DICK. L. REV. 237, 264 (1977).

in matters not directly determinative of guilt and innocence, as well as the realities of experience, have received minimal inquiry.

The subordination of precedent to notions of justice, in a system that needs uniformity and certainty, has been a perennial problem in the law.[245] If, as Justice Cardozo once said, the courts are to undertake the difficult task of objectifying the aspirations, convictions and philosophies of the men and women of the times, articulation will serve to assure others that changes — imposed and endured — reflect the careful consideration and balance of individual rights, public values, utility, and costs. The investment of such an articulation is incalculable and reaches beyond the present needs of society. There will be those in the future who will read and turn the pages of many of the cases discussed herein. For them the written record will represent their legal heritage and serve as a testament to the integrity of our legal system — and the quality of our civilization.[246]

245. See CARDOZO, *supra* note 224, at 160, where he stated:

> The conclusion of the majority of the court, whether right or wrong, is interesting as evidence of a spirit and tendency to subordinate precedent to justice. How to reconcile the tendency, which is a growing and in the main a wholesome one, with the need of uniformity and certainty, is one of the great problems confronting the lawyers and judges of our day.

246. Appellate opinions often serve as historical source material. *See, e.g.*, G. WHITE, PATTERNS OF AMERICAN LEGAL THOUGHT 74-95 (1978).